

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + Refrain from automated querying Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/

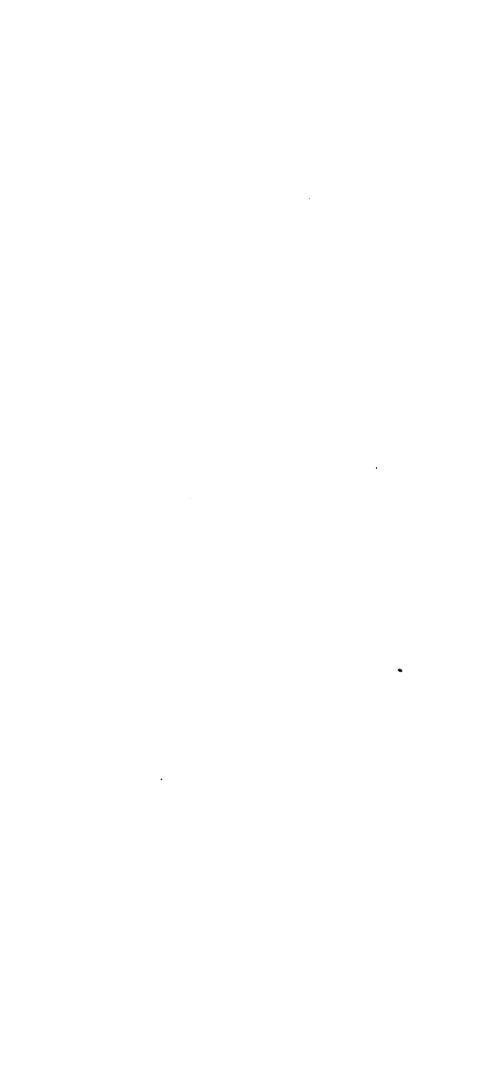


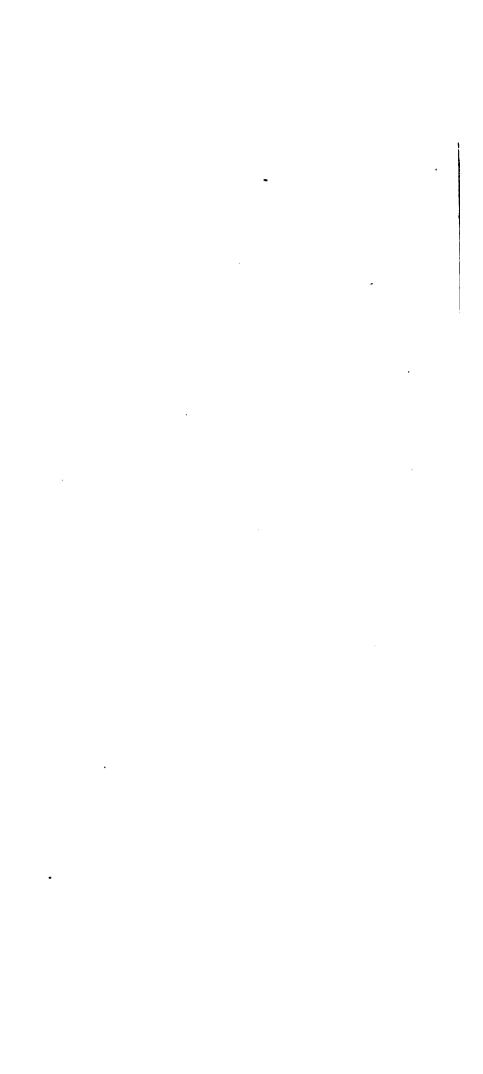
N J. 100

[. Un. St. Cili e. 1.











NEW JERSEY EQUITY REPORTS.

VOLUME XVII.

C. E. GREEN, II.

U.S. A. N.T. 100 16

L. Un. StiCiHe.T.





•





NEW JERSEY EQUITY REPORTS.

VOLUME XVII.

C. E. GREEN, II.



REPORTS OF CASES

9

ARGUED AND DETERMINED IN

2080

THE COURT OF CHANCERY,

THE PREROGATIVE COURT,

AND, ON APPEAL, IN

THE COURT OF ERRORS AND APPEALS,

OF THE

STATE OF NEW JERSEY.

17

CHARLES EWING GREEN, Reporter.

VOL. II.

TRENTON:
HOUGH & GILLESPY, PRINTERS, CHANCERY BUILDING.
1868.



CHANCELLOR DURING THE PERIOD OF THESE REPORTS, Hon. HENRY W. GREEN.

CLERK IN CHANCERY,

BARKER GUMMERE, ESQ.

Judges of the Court of Errors and Appeals.

EX OFFICIO JUDGES.

Hon. HENRY W. GREEN, Chancellor, $\left. \left. \right\} \right. \left. \left. \left. \begin{array}{l} Resigned \\ \textbf{M}_{ay} \right. 1, 1000. \end{array} \right.$

- " ABRAHAM O. ZABRISKIE, " From May 1, 156
- " MERCER BEASLEY, CHIEF JUSTICE.
- " E. B. DAYTON OGDEN,
- " LUCIUS Q. C. ELMER,
- " DANIEL HAINES,
- " PETER VREDENBURGH,
- " JOHN VANDYKE,
 " GEORGE H. BROWN,
- " JOSEPH D. BEDLE, vice Ogden, deceased.)
- from March, 1865.
 "VANCLEVE DALRIMPLE, (vice Brown, deceased,) from February, 1866.
- " GEORGE S. WOODHULL, (vice Van Dyke,
- term expired,) from February, 1866.
 "DAVID A. DEPUE, (vice Haines, term expired,) from November, 1866.

Judges Specially Appointed.

Hox. JOHN M. CORNELISON,

- " WILLIAM N. WOOD,
- " ROBERT S. KENNEDY,
- " GEORGE F. FORT,
- " EDMUND L. B. WALES,
- " JOHN CLEMENT,
- " GEORGE VAIL, (vice Wood, deceased,) from March, 1865.

This volume contains the remaining unpublished opinions of Chancellor Green, in the Court of Chancery and Prerogative Court, and brings the cases through February Term, 1866.

The reporter has thought it might be more acceptable, as well as more convenient, to the Bar, to have all decisions on appeal from the late Chancellor's decrees, published in the same volume. The decisions in the Court of Appeals are accordingly brought through March Term, 1867, leaving only one decision on appeal from his decrees unreported, viz. in The Raritan and Delaware Bay Railroad Company and the Camden and Atlantic Railroad Company v. The Delaware and Raritan Canal and the Camden and Amboy Railroad and Transportation Companies, which will appear in the next volume.

Owing to the ill health of the Chancellor, during the few months prior to his resignation of office, a number of cases at October Term, 1865, and February Term, 1866, were referred to masters. Their opinions are reported in this volume.

NEW JERSEY REPORTS.

LAW REPORTS.

COXE'S REPORT	. 'S, -	-	-	-	1 vol.
PENNINGTON'S	REPORT	3,	-	-	2 "
SOUTHARDS	66	-	-	-	2 "
HALSTED'S	**	-	-	-	7 "
GREEN'S	4.	-	-	-	3 "
HARRISON'S		-	-	-	4 "
SPENCER'S	44	-	-	-	1 "
ZABRISKIE'S	44	-	-	-	4 "
DUTCHERS	*6	-	-	-	5"
VROOM'S	**	-	-	-	2 "

EQUITY REPORTS.

SAXTON'S RE	PORT	3,		-		-		-		1	٧ol.	
GREEN'S	"		-		-		-		-	3	"	
HALSTED'S	"	-		-		-		-		4	"	
STOCKTON'S	"		-		-		-		-	3	"	
BEASLEY'S	"	-		-		-		-		2	"	
McCARTER'S	u		-		-		-		-	2	"	
C. E. GREEN'S	"	-		-		-		-		2	"	

CASES

REPORTED IN THIS VOLUME.

A
Ackerman, Dewitt v
Adams v. Adams
Ambruster, Hunt v
Anderson, John H., In re
Arthur, Whyte v
Auble's administrator v. Trimmer
В
Bacot v. Wetmore
Ball, Savage v
Barcalow v. Sanderson
Berckmans v. Berckmans
Bergen, Staats v
Black and Lippincott, Irick v
Brewer v. Norcross
Brewer v. Wilson
Brown v. Elliott
Brown v. Richards
Burd, Hoff, v
Burnet, Smith's executors v
C
Curlisle, Cooper v
Casperson, Palmer v
Chavez v. Peiffer's administrator
Clark v. Hornbeck
Conklin, Marshman v
Conover v. Smith
Cooke, Ward v

Cooper v. Carli-le	
Cramer v. Retord	
Cross v. Cross.	٠,٠
D	
De Camp. Firmstone v	
Dewitt v. Ackerman.	215
Dilts v. Stevenson	ķ.,
Dodd v. Flavell.	255
Dougherty v. Soudder	245
Dutcher, Force v	165
E	•
Egerton's executors v. Egerton	
Elliott, Brown v	
Emery v. Van Syckel	'nН
F	
Ferree, Mount Holly Turnpike Co. v	
Finch, Lawrence v	
Firmstone v. De Camp	
First Reformed Dutch Church, Van Houten v 1	12
Flavell, Dodd v	25.
Force v. Dutcher	165
Freeman v. Freeman.	44
Frey v. Frey's administrators	71
Fullerton, Galway v	3×9
G	
Galway v. Fullerton	
Giveans v. McMurtry 5	
Grognard, Normand's administrator v	423
H	
Hazard v. Hodges	
Herbert v. Mechanics Building and Loan Association 4	197
Hinchman v. Paterson Horse Railroad Co	7:
Hoagland v. Township of Delaware	10
Hodges, Hazard v	•

			_				
ጥ	Α	R	T	Æ	OF	CA	SES

Hon v. Burd
Hogencamp v. Paterson Horse Railroad Co
Holcomb, Vanderveer v 87, 547
Holmes, Low v
Hornbeck, Clark v
Howell, Tuttle v
Huffman v. Hummer
Hummer, Huffman v
Hunt v. Ambruster
Hunterdon Co. Bank v. Nassau Bank
Ι.
In re Curtis White
In re John H. Anderson
Irick v. Black and Lippincott
J
Jacobus, Vanness' executors v
Jones v. Jones
K
Kearney's executor v. Kearney 59, 504
${f L}$
Lanning v. Lanning's administrator
Lawrence v. Finch
Letson's executor v. Letson
Lithauer v. Royle
Low v. Holmes
Low. Society for establishing useful manufactures v
Luse's executors v. Parke
М
Marlatt v. Perrine
Marshman v. Conklin
Matthiesen, Morris Canal and Banking Co. v
McMurtry, Giveans v
Mechanics Building and Loan Association, Herbert v 497

Mittnight v. Smith2	5 <u>9</u>
Morrell, Randall v 3	43
Morris Canal and Banking Co. v. Matthiesen 3	
Mount Holly Turnpike Co. v. Ferree 1	17
Ň	
Nassau Bank, Hunterdon Co. Bank v 4	
New Jersey Arms and Ordnance Co., Potts v	
Norcross, Brewer v	
Normand's administrator v. Grognard	20
P	
Palmer v. Casperson	04
Parke, Luse's executors v 4	
Paterson Horse Railroad Co., Hinchman v	75
Paterson Horse Railroad Co., Hogencamp v	83
Peiffer's administrator, Chavez v	57
Perrine, Marlatt v	49
Potts v. New Jersey Arms and Ordnance Co 395, 5	16
•	
\mathbf{R}	
Randall v. Morrell	
Reford, Cramer v	
Reid v. Reid	
Richards, Brown v	
Robbins, Whitney v	
Rolason, Weller v	13
Royle, Lithauer v	40
8	4.5
Sanderson, Barcalow v	
Savage v. Ball	
Sayre v. Sayre	
Seudder, Dougherty v	
Seymour v. The Long Dock Co	
Shreve v. Shreve	
Sisson, Weehawken Ferry Co. v	
Smith, Conover v	
Smith, Mittnight v 2	
Smith's avantage v. Rumat	1/1

TABLE OF CASES.	11
Snover v. Snover,	85
Society for establishing useful manufactures v. Low	19
Spengeman, Von Hurter v	185
Staats v. Bergen	554
Stevenson, Dilts v	407
Stryker, Whitehead's executors v	
т	
The Long Dock Co., Seymour v	169
Thomas v. Thomas,	
Township of Delaware, Hoagland v	
Trimmer, Auble's administrator v	
Tuttle v. Howell	
10,	011
v ·	
Vanderveer v. Holcomb	54'
Van Horn, Vreeland v	
Van Houten v. First Reformed Dutch Church	
Vanness' executors v. Jacobus.	
Van Ryper, Vreeland v	
Van Syckel, Emery v	
Von Hurter v. Spengeman	
Vreeland v. Van Horn	
Vreeland v. Van Ryper	
v reemid v. van kyper.,,,	100
W	
Ward v. Cooke	9
Weehawken Ferry Co. v Sisson,	47
Weller v. Rolason.	13
Wetmore, Bacot v	25
White, Curtis, In re	
Whitehead's executors v, Stryker	
Whitney v. Robbins.	
Whyte v. Arthur	
Wilson, Brewer v.	
,	
Wilson v. Wood	
Wood, Wilson v	21
Y	
Young v. Young	16.
•	

.



CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW JERSEY,

FEBRUARY TERM, 1864.

HENRY W. GREEN, Esq., CHANCELLOR.

DAVID WELLER and WIFE vs. JONATHAN P. ROLASON and others, legatees of John Rolason, deceased, the heirs of Jonathan A. Park, deceased, and the heirs of Nathan Park, deceased.

- 1. Where it is clearly the intention of the parties to convey the whole state, equity will decree a conveyance of the fee according to the intention of the parties, notwithstanding the want of words of inheritance in the grant.
- 2. If a trustee dies without executing the trust vested in him, the trust survives, and equity will decree its due execution.
- 3. Where a testator, by his will, has directed his executor to purchase real estate, and hold it subject to certain trusts in said will named, but the deed therefor contains no declaration of the trust, the executor will, nevertheless, be declared to have been seized of the land as trustee for the purposes specified in the will.
- 4. One of several cestuis que trust cannot, by purchasing the legal title to the land which forms the subject of the trust, defeat the equitable title Vol. 17

Weller v. Rolason et al.

of the other cestuis que trust thereto, when such purchase was made with a knowledge of their equity. The estate in his hands will be held subject to the purposes of the trust.

- 5. Where two or more persons having an interest in lands, claim under an imperfect title, and one of them buys in the outstanding title, such purchase will enure to the common benefit, upon contribution made to repay the purchase money.
- 6. But such purchaser can claim no contribution for the price paid for the legal title, from those interested with him in the equitable estate, when the title purchased by him in no wise enures to the benefit of the estate.

John Rolason, late of the township of Oxford, in the county of Warren, by his will, bearing date on the twenty-first of June, 1830, among other things, devised and directed that the remainder of his property should be sold for cash, and the remainder of the money applied to purchase a house and lot suitable for the family; the house and lot to be his wife's during her widowhood, and after her death, the property to be sold and equally divided among the children of the testator.

A house and lot was purchased by the executor, which was occupied by the widow of the testator during her life. After the death of the widow, Jonathan P. Rolason, one of the heirs-at-law and devisees of the testator, claiming that the deed to the executor conveyed an estate only for his life, purchased of part of the heirs of the grantee their interest in the land, and claims title thereto in his own right.

The complainants seek—First. To reform and amend the deed to the executor so as to conform to the agreement for the purchase, by inserting therein words of inheritance, so as to vest in the grantee an estate in fee simple, with a declaration that the same is held upon the trusts declared by the will of the said testator, for the benefit of his children.

Secondly. That the parties having the legal title be decreed to hold the same for the benefit of the devisees of the said testator, according to the provisions of his will.

Thirdly. That the land be sold under the directions of the

Weller v. Rolason et al.

court, and the proceeds of the sale be distributed among the children of the testator, pursuant to the directions of his will.

Mr. Depue, for complainants.

The bill has two objects.

- 1. To correct a deed made to Jonathan A. Park, the executor of John Rolason, deceased, by enlarging the estate conveyed by the deed, from an estate for life to an estate in fee.
- 2. To declare the trusts upon which the conveyance was made.

The deed was made to Park as a residence for the widow of the testator for her life, and afterwards for the benefit of the heirs. Full consideration for the fee was paid. It was a mere clerical mistake. J. P. Rolason, one of the heirs, discovered the defect in the title, and procured a release from the widow and heirs of the grantor, and attempts thereby to defraud his co-heirs. His answer does not deny his knowledge of the trust, nor that the property is subject to it.

The fact that the property was purchased by the executor with the trust fund, and intended to be held for the purposes of the will, is clearly established in evidence. It was to be held for the widow for life, and then for the heirs in fee.

As against the executor, the deed itself, in connection with the fact that the consideration paid belonged to the estate, is a sufficient declaration of trust. Hill on Trustees 63.

As against the heirs, there is evidence on the face of the deed that an estate in *fee* was intended to be conveyed. The grantors convey all their interest. They covenant that they are seized in fee, and that they will warrant and defend the title forever.

Covenants will not operate to enlarge the estate beyond the operative terms of the grant, yet in equity they are evidence of intention. Ross v. Adams, 4 Dutcher 160; 2 Story's Eq., § 980.

Weller v. Rolason et al.

By a covenant to the heirs of the grantee, a fee would pass by estoppel. Terrett v. Taylor, 9 Cranch 53. Equity will hold the heirs estopped. Chamberlain v. Thompson, 10 Conn. 243.

If the word "heirs" is omitted from a deed, the omission will be corrected, where it is obvious from the deed that the intention of the parties was to pass the fee. Higinbotham v. Burnet, 5 Johns. Ch. R. 184.

As the trust in the will, which was intended to be carried into effectably the deed, could only be executed by an estate in fee, it may be a question whether the deed itself does not convey a fee. Fisher v. Fields, 10 Johns. R. 495; Hill on Trustees 64.

The court will execute the trust. 2 Story's Eq. Jur., § 1061; Brown v. Higgs, 8 Vesey 570, 574.

Mr. J. M. Robeson, for J. P. Rolason, one of the defendants.

The testator died on the fourth of THE CHANCELLOR. July, 1830. On the twenty-ninth of May, 1832, the executor exhibited his final account for settlement and allowance, by which it appears that there remained in his hands a net balance of \$397.68. By deed bearing date on the twentyseventh of March, 1833, Nathan Park, for the consideration of \$400, conveyed to Jonathan A. Park, the executor, a house and two lots of land, containing about sixteen acres. deed itself does not specify the purpose of the trust, but it furnishes satisfactory evidence that it was taken by the grantee, not for his own benefit, but in trust for the estate of his testator. The conveyance is made to him, not in his individual, but in his representative capacity, by the name and description of Jonathan A. Park, executor of the last will and testament of John Rolason, deceased. The consideration is acknowledged to have been paid by him in his capacity of executor. The conveyance is to him "as executor aforesaid, or to his lawful representatives as such."

Weller v. Rolsson et al.

habendum and tenendum clause describes his estate and interest in the same terms. The covenant is "with the said party of the second part, or with his lawful representatives, as executor aforesaid." The warranty is unto "the said Jonathan A. Park, as executor aforesaid, or his lawful representatives." As against the grantee, the terms of the conveyance afford satisfactory evidence that the land was held by him, not in his own right, but in trust for the estate of his testator. The evidence shows that the purchase money was paid with the funds of the estate. There is, consequently, a resulting trust in favor of the estate, The evidence demonstrates the special nature and purpose of the trust. the will of the testator, the remainder of his estate was directed to be invested in the purchase of a house and lot, suitable for the family, to belong to his wife during her widowhood, and on her death, to be sold and equally divided among the children. On the settlement of the estate, a year previous to the date of the deed, there was found in the hands of the executor a residue of \$397.68, within three dollars of the price paid for the land. On the purchase of the property, the widow entered into possession and continued in the enjoyment of it during her life. The grantee never claimed title to it in his own right, or for any other purpose. was no other trust under the will for which the estate could have been held by the executor, than that to which it was applied.

The deed, by its terms, conveys only an estate for life. The conveyance is to the grantee and his lawful representatives, not to his heirs. Littleton, § 1; 1 Sheppard's Touch. 101-2; 4 Kent's Com. 5; Kearney v. Macomb, 1 C. E. Green 189.

The application of the principle, that in a common law conveyance, the use of the word "heirs" is necessary to create an estate in fee, is not affected by the circumstance that the conveyance is made in trust, and that a less estate will not be sufficient to satisfy the trust. The language of Chief Justice Kent, in Fisher v. Fields, 10 Johns. R. 505, is

Weller v. Bolance et al.

applicable only to wills or instruments other than common law conveyances, as the cases sited by him abundantly prove. But the fact that the land was conveved in trust—that an estate for life would not be sufficient to satisfy the trust, the purpose of the trust being known to the grantor-affords strong evidence that it was the intention of the parties to convey an estate in fee. This intention is also evinced by the terms of the covenant of warranty, which is in favor of the grantee and his lawful representatives forever. circumstances, in connection with the facts established by the evidence, that the price paid was a full consideration for the fee of the land, and that the cestul que trust was permitted to hold and enjoy the land for several years after the death of the grantee, when an estate for life would have ended, afford satisfactory proof that an estate in fee was intended to be conveyed. Where it is clearly the intention of the parties to convey the whole estate, equity will decree a conveyance of the fee according to the intention of the parties, notwithstanding the want of words of inheritance in the grant. Higinbotham v. Burnet, 5 Johns. Ch. R. 184: Fisher v. Fields, 10 Johns. R. 495: Bradford v. The Union Bank, 13 How. 66; 1 Story's Eq. Jur., § 152.

Jonathan A. Park, the executor, to whom the legal title was conveyed, will be declared to have been seized of the land as trustee, for the purposes specified in the will; and the land will be disposed of, and the proceeds applied as though the trusts were expressed in the deed. The trustee having died without executing the power, the trust survives, and equity will decree its due execution by a sale of the estate for the specified trust. 2 Story's Eq. Jur., § 1061.

Jonathan P. Rolason, one of the legatees under the will of his father, of an equal share with the other children in the trust estate, has become the owner in his own right of a part of the land, having purchased the legal title from a part of the heirs of Jonathan A. Park, the grantee. But he cannot thereby defeat the equitable title of the cestuis que trust, for it is obvious from his answer that he purchased with

Society for Establishing Useful Manufactures v. Low.

knowledge of their equity, and that he acquired the legal title for the purpose of gaining an undue advantage over those having an equal interest with himself in the equitable estate.

There is another principle equally fatal to his exclusive title to the shares purchased by him. Where two or more persons having an interest in lands claim under an imperfect title, and one of them buys in the outstanding title, such purchase will enure to the common benefit, upon contribution made to repay the purchase money. "Where," says Chancellor Kent, "two devisees are in possession under an imperfect title, derived from their common ancestor, it is not consistent with good faith, nor with the duty which the connection of the parties, as claimants of a common subject created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself." Van Horne v. Fonda, 5 Johns. Ch. R. 407; Rothwell v. Dewees, 2 Black's R. 618.

Nor can he claim any contribution for the price paid for the legal title from those interested with him in the equitable estate. The title purchased by him has in no wise enured to the benefit of their estate.

The complainants are entitled to the relief prayed for, and it will be decreed accordingly.

THE SOCIETY FOR ESTABLISHING USEFUL MANUFACTURES vs. HENRY M. Low.

^{1.} Where the equity of the bill is not denied, or where the facts upon which the equity rests are admitted, but the answer sets up new matter in a voidance, the injunction will not be dissolved or denied upon the answer alone

New matter, by way of justification or avoidance of the matters contained in the bill, will not avail the defendant upon the hearing upon bill and answer.

Society for Establishing Useful Manufactures v. Low.

- 3. The right of a party to an injunction, or to its continuance, cannot be prejudiced or altered by the mere fact that the case is heard upon the argument of the rule to show cause why an injunction should not issue, upon the complainant's motion, and not upon a motion to dissolve by the defendant. The defendant, in such case, stands upon the same ground and with the same rights that he would upon the motion to dissolve.
- 4. A denial of the complainant's right, upon an application for an injunction, must be made upon the defendant's knowledge, and not upon his belief or opinion.
- 5. The Passaic, at the great falls, is a private river. The complainants are the riparian proprietors, and are entitled to the use and enjoyment of the stream without diminution or alteration.
- 6. Where a party seeks an injunction to restrain a violation of a covenant under a lease, and such covenant is a continuing covenant running with the land, and its violation is of constant recurrence, his title to relief is not forfeited by long delay in making his application.
- 7. If, under the circumstances, an injunction had been asked without due notice that the complainant insisted upon the performance of the covenant, the motion might have been resisted upon the ground of surprise.

The bill in this cause was filed to enforce the specific performance of certain covenants in a lease. It contained a prayer for injunction to restrain the defendant from exceeding his rights under the lease. The injunction was withheld, and a rule to show cause granted. The cause is now heard upon the argument of the rule.

Mr. A. S. Pennington, for the rule.

The lease and all its covenants, as set out in the bill, are admitted by the answer. The answer also admits that no gauge has been inserted by the defendant, pursuant to the terms of his agreement. This establishes our case.

There is no covenant in the lease to maintain any designated head of water, nor any pretence that the complainants have violated any of the covenants of the lease.

The excessive use of water is irreparable injury, which there is no mode of estimating. The consumption cannot be gauged, except by stopping the supply.

The pretence that the head of water in the canal has been

Society for Establishing Useful Manufactures v. Low.

reduced, is groundless. The head is, in fact, higher now, than at the date of the lease.

The right of the complainants to the water was established years ago by this court. The application is merely to restrain its use until the gauge is inserted.

Mr. A. B. Woodruff, contra.

The bill is filed for two objects.

- 1. To restrain the use of water.
- 2. To compel the performance of covenants in the lease.

The defendant is not a tenant of the complainants, except as to one foot of water. If he uses more than that, he is a mere trespasser. He pays rent to the Olivers, who are his landlords. The complainants have only a reversionary interest.

The evidence does not show that the defendant uses more than one foot of water. Nor does it show what is meant by a foot of water.

The defendant's witnesses prove that his machinery is driven by less than one foot of water. All the machinery can be driven by twelve horse power. He does not use over one square foot under thirty inch head.

There is no evidence that the complainants own the water in the raceway. This is the first step in the proof essential to sustain the application. 3 Daniell's Ch. Pr. 1834, note 1.

If the complainants have allowed other parties, by user of more than twenty years, to acquire rights adverse to them, such adverse right can furnish no ground for the interference of this court.

Admitting complainants' right, they have no title to the injunction. The defendant's act is neither waste, nor destruction, nor irreparable injury.

There is no charge that the defendant is not responsible. The complainants are entitled to no account, except as incident to the commission of waste. 3 Daniell's Ch. Pr. 1856.

The defendant is entitled to the foot of water under head of thirty inches. That head the complainants are bound to

maintain. They lease more water than they can furnish in a dry season. They have leased twenty-two square feet of water to different lessees, which the society themselves say is all they can furnish. 1 Halst. Ch. R. 126, 128, 134; Saxton 393.

The injunction compelling the defendant to insert an aperture, would stop his mill and compel him to suspend his business. This injury the court will not inflict.

Mr. Frelinghuysen, Attorney General, in reply.

The injunction is asked, not because the defendant uses too much water, but because he refuses to put in a gauge by which the water can be accurately measured. The contract of the defendant is in clear terms. We ask that it be enforced.

The complainants have an interest in the surplus and wasted water, which the court will protect. The defendant covenanted to respect the complainants' rights to that water, and to draw only through an iron aperture. It is that covenant which we seek to enforce.

The title of the complainants to the water, we admit, must be clear. That title is matter of law, and has been established.

The answer admits that the society own all the mill sites, and consequently all the water power, except such as they have sold or leased. If the defendant alleges that they have parted with their rights, the proof of that fact is upon him.

The defence is that the defendant is entitled to the thirty inch head above the aperture. The lease contains no such covenant, nor are there any circumstances from which it can be inferred at law.

If the aperture is inserted, and the society do not furnish a sufficient head, the defendant has his remedy. There is no covenant in the lease alleged to have been violated by them.

The allegation of the answer is, that the society were bound at all times to furnish the foot of water under a head of thirty inches. The water was to be furnished under the head as it then was. It is notorious that every summer the

water is too low to furnish the head insisted on by the defendant. The meaning of the contract could not have been as the defendant insists.

THE CHANCELLOR. On the fifth of April, 1831, the complainants, being the owners of certain lands and water power at Paterson, conveyed to Roswell L. Colt, lot No. 8, on their middle canal, with the right of drawing from the canal one foot square of water, to be drawn in the mode hereinafter specified. On the first of February, 1837, Colt leased the lot and water power to William Beggs, for the term of twenty-one years, with the privilege of renewal upon the terms and conditions therein, and in the indenture of renewal, specified.

On the first of February, 1858, Robert M. Gibbes and others, the then owners of the land and water power, leased to Beggs; and Thomas D. Hoxsey, the then owner of the interest of Beggs therein, together with the complainants, executed an instrument in writing, renewing the said lease for the further term of twenty-one years. The complainants seek to enforce the specific performance of the covenants contained in this lease against the defendant, who occupies the premises by assignment from Hoxsey.

The terms of the contract are clear and precise. The lessors demised the lot and mill, with the right and privilege of drawing and using on said lot, from the middle canal in the rear thereof, and discharging the same in front of said lot into the canal, in Congress street, one foot square of water, equal to one hundred and forty-four square inches of water, strict measure, and no more; said water to be drawn through a cast iron aperture, six inches one way by twenty-four inches the other, strict measure; and no devices or contrivances to be made or used to increase the natural flow of water.

The lessee, for himself and his assigns, among other things, covenanted with the complainants, that he would cause a cast iron aperture to be made, and permanently and securely

placed in the bank of the middle canal, in the rear of the said lot, not lower than the bottom of the trunk leading from the canal to the lot, as the trunk was at the execution of the original lease, and which aperture should in no case, and at no time, admit of a greater quantity of water to pass, than what will naturally flow through an aperture six inches one way by two feet the other, strict measure; and that he would at all times during the continuance of his lease, maintain and keep the trunk, trough gates, and aperture upon the said premises, so as effectually to prevent all waste or use of water in any manner whatever, beyond the limited quantity allowed by said indenture to be taken or drawn from said middle canal, accidents alone excepted; and further, that he would not use or permit to be used, or allow to run to waste on said lot, any more or greater quantity of water, or in any other mode take or draw the same, than is by the said lease allowed.

The bill is filed to enforce the specific performance of these covenants on the part of the lessee. It asks that the defendant be restrained from drawing more water than one hundred and forty-four square inches, or in any other mode than through the aperture specified in the lease.

The answer admits all the material charges of the bill, upon which the claim to an injunction is founded. It admits the existence and obligation of the lease, as set out in the bill, that no aperture has been inserted as required by the covenant, that the water drawn and used upon the premises is not drawn through an aperture of the character specified in the lease, and does not deny that more than one foot square of water is used upon the premises. The bill charges that the defendant has used, and is now using upon the premises, not less than four square feet of water, and as they are informed and believe, a great deal more, and that he ought to pay \$600 a year for each square foot of water so used, which is the usual rate of the rent of water in Paterson. Affidavits annexed to the bill, sustain the allegations that the water is drawn upon the defendant's wheel without

any gauge, and that he is using at least four square feet of water. The defendant denies that he is using a quantity of water greatly exceeding one square foot; and affidavits are annexed to the answer to show that it is impossible to use more than two square feet of water on the defendant's wheel, and that the machinery used in the mill requires less power to drive it, than would be furnished by two square feet of water.

This very conflict of testimony demonstrates the propriety of an injunction. The defendant, by his lease, is entitled to draw but one square foot of water. All that he uses beyond that is an unauthorized diversion and use of water belonging to the complainants, without the possibility of their ascertaining the extent to which they are injured. It was against this very use that the covenants in the lease are designed to guard. The covenant on the part of the lessee is not only that he will use but one square foot of water, but that he will maintain an aperture which shall effectually prevent the use of water, in any manner whatever, beyond the quantity allowed by the lease, and that the water shall be drawn and used in no other mode. The design of the covenants clearly was, not only to prevent the use of more water than was allowed by the lease, but to furnish at all times unequivocal evidence of the quantity used. The complainants ask, therefore, not only that the defendant should be restrained from using an excess of water to their prejudice, but that he should be restrained from drawing any water, under color of his lease, except in the mode therein specified; that they may have the protection against the wrongful acts of the defendant, which the covenants in the lease were designed to Upon the case made by the bill, the complainants secure. are clearly entitled to an injunction.

The question, if any there be in regard to the case, is created by the matters set up in the answer by way of justification or avoidance. It would, perhaps, be a sufficient answer to the matters insisted on by way of defence, to say that they cannot avail the defendant at this stage of the

Vol. 11.

cause. Where the equity of the bill is not decied, or where the facts upon which the equity rests are admitted, but the answer sets up new matter in avoidance, the injunction will not be dissolved or decied. Butler v. The Society, I Beas. 266, 506; Green v. Fallas, Ibid. 267; Allen v. Craberoft, Barn. Ch. R. 373; Menturn v. Serment, 4 Johns. Ch. R.

499: Salmon v. Clagett, 3 Bland's Ch. R. 1:2-3.

The defendant in this case stands upon the same ground, and with the same rights, that he would do upon a motion to dissolve. The complainants equity, and their title to an injunction upon the case made by the bill, was clear. The injunction was withheld in the first instance, and the rule to show cause was granted, because it was deemed proper, under the circumstances, that the defendant should have an opportunity of denying that equity. The complainants right to an injunction, or to its continuance, cannot be prejudiced or altered by the mere fact that the case now stands upon the complainants' motion, and not upon a motion to dissolve.

The only allegation in the answer which is directly responsive to the allegations of the bill and a demal of the complainants equity, is that which relates to their title to the water in controversy.

The bill alleges that the complainants are the owners of the water and of the works at Paterson, under their act of incorporation. The defendant, by his answer, says that he believes that neither the act of incorporation, nor the supplements thereto, nor any acts which the society have done, nor all combined, vest the property or ownership of the waters of the Passaic river, or in the canals or raceways at Paterson, in the complainants, and that they have no right to the said waters, or to divert the same, except for the purposes of navigation.

A denial of the complainants' right upon an application for an injunction must be upon the defendant's knowledge, and not upon his belief or opinion. This is clearly a matter not within, and not pretended to be within, the defendant's

knowledge. If the allegation be untrue, it does not expose him to the penalties of perjury.

Nor is he in a situation to deny the complainants' title. He is under covenant with them not to draw the water, and he is estopped by his covenant from denying their right. All the right he has to the water is derived from their grant. He holds as tenant under their grantee, and neither he, nor his immediate landlords, can deny the complainants' title.

But if the defendant was in a situation to call in question the title of the complainants, and if his denial of the title were absolute, the allegation of the answer is destitute of foundation. The title of the complainants, under their charter, to the waters of the Passaic, for the purposes to which it is applied by them, has been too often recognized by this court, and is too firmly established, to be treated as an open question. As early as 1829, in the case of The Society v. The Morris Canal and Banking Company, Chancellor Williamson, in an opinion characterized by his usual learning and ability, and which, to the regret of the court and the loss of the profession, is not reported, said: "The river Passaic, at the great falls, is a private and not a public river. As owners of the lands, the society has a clear and undoubted right, in my opinion, to the flow of all the waters of the Passaic at the great falls in their ancient channel, without diminution or alteration. The society has appropriated by occupancy the whole water of the Passaic river for manufacturing purposes, as they had a right to do under their charter.

Chancellor Vroom, in 1830, expresses his opinion as to the rights of the society in language equally clear and emphatic. "The society," he says, "are the riparian proprietors, and upon plain and acknowledged common law principles, they are entitled to the use of the stream, and have a right to enjoy it without diminution or alteration. Their right is not confined to the use of so much water as may be necessary for their present purposes. They have appropriated to themselves the use of the stream. They have the right to take the whole of it

for the purposes of their manufactures, provided it is again, after being used, restored to the bed of the river for the benefit of those below." The Somery v. The Moore Canalization of Co., Somer, 137.

Again: the lefendant alleges that he has been informed and believes, that the water has been brown through the munk, as it now is, for more than thirty years, since the immed lease to Berrs. This allegation is not made upon the lefer large knowledge, and cannot, therefore, avail upon this motion. But a imitting it to be true, how can it affect the complainants' rights? The lease was renewed, and the presents which the complainants seek to enforce, were entered into in 1887. By those sovenants the lessee bound himself from time to time, and at all times, to maintain the aperture which then was, or thereafter should be, made, so as effectually to prevent the use of water beyond the limited quantity allowed by the lease. There can be, therefore, no presence of title acquired by the lessee by long continued ensyment adverse to his covenant. Nor is it perceived that there is any ground for declaring that the complainants have forfeited their title to relief by laches upon their part. The occenant on the part of the lessee, to draw the water only in the mode specified in the lease, is a continuing covenant running with the land, binding upon the assignee, and which is daily violated so long as the water continues to be drawn otherwise than in conformity with the terms of the covenant. If, under the circumstances, the injunction had been asked without notice that the complainants insisted apon the insertion of the aperture, there would have been reason for resisting the motion upon the ground of surprise. But no such defence is suggested. The defendant had written notice to insert the aperture, long before the filing of the bill

But the main ground of objection to the granting of the injunction is, that the complainants have not kept and performed the covenants of the lease on their part in this, to wit, that the water in the raceway has not been uniformly kept at a head of thirty inches above the centre of the pro-

posed aperture. The defendant says that he has been advised by counsel, and verily believes, that the complainants are bound by law to keep at all times (except in case of necessary repairs) in the middle canal, a quantity of water sufficient to furnish, if a cast iron aperture should be inserted at the bottom of the canal of the dimensions of six inches by twenty-four inches, according to the terms of the lease, a head of at least thirty inches above the centre of the aperture; that such was the intention of the parties to the deed from the society to Colt, and of the parties to the lease to Beggs; that such was the understanding of the parties upon the renewal of the lease to Hoxsey; and that the complainants have failed to supply in the said canal, a quantity of water sufficient to enable the defendant to draw at all times one foot square of water under a head or pressure of at least thirty inches, as intended and understood by the said lease, and the parties thereto.

The answer to the objection is, that there is no covenant on the part of the complainants to keep the water at any given head above the aperture. The only covenant, on their part, is that they will keep up and maintain the main dam and banks of the canal in front and rear of the demised premises, so that the foot square of water thereby demised, may at all times, during the said demise, flow freely into and upon, and out of and from the said demised premises, without diminution or hindrance, unavoidable accident alone excepted.

It may well be, that when the lease was originally made, and when it was renewed, the dam and the banks of the canal were constructed with the view and intention of maintaining a head of thirty inches of water above the middle of the aperture; and there is no allegation that they have not been so kept and maintained. The allegation is that there is not, at all seasons of the year, water enough in the canal to maintain the full head for which the canal was intended. There is no covenant by the complainants, express or implied, that they would at all times furnish that head. Admit

that the society are bound by the terms of the covenant to furnish the stipulated supply of water, there is clearly no covenant as to the degree of pressure under which that supply should be furnished. The answer alleges, that during the continuance of the lease to Beggs, a supply of water sufficient to maintain that head at all times was not furnished. If, then, the supply to maintain such head could be furnished, and the parties to the lease intended that it should be, would there not have been an express covenant to that effect? on the other hand, by reason of a deficiency of water in the dry season, or from any other cause, that head could not at all times be maintained, is it probable that the lessors covenanted or intended to covenant to furnish such supply? Is it not more probable that the lease was made and accepted by the lessees, subject to that fluctuation of the head to which all water power is subject during the course of the Be this as it may, the obvious fact is that no such covenant was made, and none can be implied.

The defendant alleges that he is ready to place and use in his mill, a wheel capable of using only one square foot of water under a head of thirty inches, as soon as the wheel can be constructed. But that is no compliance with his covenant to draw the water from the canal in the mode specified in his lease.

Again: he alleges that he is willing to insert the aperture as required by the covenant, as soon as the complainants will furnish, the year round, a foot square of water under a head of thirty inches. But he has no right to annex such condition to the performance of his covenant.

There are also allegations in the answer, that by a contract of the complainants with a mill owner on the upper canal, the supply of water in the middle canal had been irregular; and that, by reason of the increased velocity of the flow of water through the canals, the head under which the water is drawn upon the wheel has been diminished, and by reason of the increased quantity of water thrown into the lower canal, the efficient head and fall, and consequent power of the wheel, has been diminished. It may be that these and

other similar causes may furnish grounds of action at law, or in equity, against the complainants. But they afford no reason, in my judgment, why this injunction should not issue. the contrary, they evince the propriety, if not the actual necessity, of the issue of the injunction, to restrain the mill owner from drawing more water than by his covenant he is It is obvious that if every or any mill owner is entitled to. permitted to draw water without limit, he must do so to the prejudice, not only of the complainants, but of every other mill owner upon the power. The velocity of the flow of water in the upper canal is increased, and by this increase of water in the tail-race or lower canal, the efficient head and fall at every mill upon that level is diminished. The most effectual mode of guarding against these grievances is to require each mill owner to draw water only through the aperture prescribed by his lease, so as effectually to prevent the use of more water than he is entitled to. It is the usual mode adopted on large water powers, where different mill owners draw their water from the same reservoir, and seems absolutely essential to protect the rights both of lessor and lessees. To allow the existence of the evils to prevail as a ground for not enforcing the use of the gauge at every mill, is simply to allow the effects of the wrong to justify its continuance.

In the case of The Society v. Butler, 2 Beasley 498, the Court of Appeals refused to enforce the specific performance of a contract made by the complainants, for the reason, among others, that its performance would operate injuriously to the interests of other lessees. I took occasion in that case, to express my views of the peculiar relation occupied by the complainants in regard to the lessees of their power. The same reason which influenced the court in denying the injunction in that case, affords an inducement why the defendant should be held to the specific performance of his covenant to use no more water than he is entitled to, and to measure the quantity used by the prescribed form of gauge.

The injunction is granted. The defendant will be allowed twenty days to procure and insert the gauge.

John Wardell Brown vs. Sarah E. Richards and others, the widow and heirs-at-law of Jesse Richards, deceased.

1. A willow joined with the heirs-at law of her deceased husband in the execution of two mortgages to satisfy a part of the indebtedness of his estate, pledging her individual interest in the lands of which he died seized, to the payment of that specified indebtedness. To secure the remaining indebtedness, the heirs at law, alone subsequently executed other mortgages upon the same real estate. By an arrangement between the executors and the subsequent mortgagees, they were authorized to enter upon the mortgaged premises, sell all the standing timber fit for market, receive the proceeds of sales, and appropriate them towa de the payment of the mortgages in such proportions as might be agreed upon by the mortgagees respectively. Under this agreement sales of timber were made to a large amount. By a subsequent arrangement between the first mortgagee (complainant in this suit) and the subsequent mortgagees, the proceeds of these sales were applied, not to the complainant's navigage, which was executed by the widow, but to the subsequent mertgages, the holders thereof guaranteeing the pay ment of the complainant's mortgages. Held-

First. The interest of the widow cannot be thus subjected to the encumbrance of the entire mortgage debt. It is hable only for the debt secured by the mortgages to the complainant, executed by herself. Beyond that, it is unencumbered

Second. The widow is entitled to have her claim for dower satisfied out of the proceeds of the sale of the land, as though the entire net proceeds of the sale of the timber had been applied toward the satisfaction of the complainant's mortgage.

Third To afford the widow the protection to which she is entitled, and to secure to her the full value of the dower in the equity of redemption, it is necessary that the entire value of the timber cut upon the premises should be credited upon the mortpage to which she became a party.

- 2. A widew is entitled to dower in wild or unimproved lands.
- 2. If the land he sold under the mortgage, the value of the dower in woodcand is ascertained by the same rule which is applicable in any other case.
- 4 Where a wife s inhoritance has been sold and conveyed by the histand and wife, and the proceeds have been used by the husband, without any contract with the wife for repayment, the wife, after the death of the husband has no chain in equity upon the real estate of the husband, as against in creditors.

Mr. J. Wilson, (with whom was Mr. J. L. N. Stratton) for the Mount Holly Bank, one of the defendants.

The bill is an ordinary bill for foreclosure, against the widow, the executors and heirs of Jesse Richards, deceased.

The complainant's mortgages were given by three of the sons and devisees, who were also executors, also by the widow and other children, for \$37,000, on Batsto, and other tracts in Burlington and Atlantic. The complainant released all the lands in Atlantic, and part of those in Burlington.

The Mount Holly Bank holds a subsequent mortgage for \$20,386, and the Medford Bank for \$6695, executed by the same parties, except the widow. There were also sundry subsequent judgments.

There was a prior mortgage upon the premises executed by Jesse Richards and wife to Quinton Campbell, in trust, for \$13,475.

The banks, by their answer, admit the priority of the complainant's mortgage, and set up rights under their own.

The controversy principally arises under an agreement between the executors and the banks, dated the 4th of January, 1858.

By the will, the widow was to receive the interest of \$100,000, instead of dower, and there is strong reason to believe that the executors, with her consent, so managed the estate as to give her that amount instead of dower. Large tracts of land were sold by the executors, the complainant releasing his encumbrance, and the widow releasing her dower.

Subsequent to the agreement of 4th January, 1858, and by virtue of that agreement, repeated sales of timber were made by the executors, by whom the conditions of sale were signed.

The widow never applied to have her dower assigned. The presumption is that she determined to accept the provision made by the will, in lieu of dower. The expectation was that the estate would be sufficient to pay her that amount.

The widow, before the assignment of dower, has no estate; it is a mere chose in action. 4 Kent's Com. 61; Den v. Dodd, 1 Halst. R. 367; Andrews v. Andrews, 2 Green's R. 141; Davison v. Davison, 3 Green's R. 235, 241.

If dower had been assigned, she would have been but tenant for life, and entitled only to estovers.

In some of the states it is held that the widow is not entitled to dower in wild lands, though in this state it is otherwise. Doughty v. Doughty, February T. 1856, manuscript opinion of Chancellor Williamson. In regard to wild lands, the widow could have only nominal damages for the waste by cutting timber.

The timber belongs to the heirs, or those having the estate of inheritance. Whitfield v. Bewit, 2 P. W. 240; Bewick v. Whitfield, 3 P. W. 267; Pyne v. Dor, 1 Durnf. & East. 55.

But admitting the widow's right, her dower is barred. The sales were being made for nearly three years, with her knowledge and assent. Her answer does not deny ignorance of the agreement made by the executors. A widow may waive dower by her acts.

If dower is not barred, the court, after the sale of the timber and credit for the proceeds given on the mortgages of the bank, cannot transfer those credits to a prior mortgage.

The answer also claims that the proceeds of the property of Mrs. Richards, sold in Philadelphia, were expended on the Batsto property, and on that ground she claims the protection of this court. That property was sold, and the investment made prior to the date of the mortgage, and cannot affect or impair the legal rights of the mortgagees.

Mr. Woodhull, for Mrs. Richards.

The widow executed the complainant's mortgage, but was no party to the mortgages to the banks. Her dower right was pledged merely as a security for the debt to the complainant. There is equity, therefore, in applying the proceeds of sales of timber growing on the premises to the first

mortgage debt. None whatever in applying it to the satisfaction of subsequent mortgages.

The money raised by the complainant's mortgage was to pay the debt of the husband. The dower right was pledged as surety, not as principal. Equity will subrogate her to the rights of the mortgagee. Parteriche v. Powlet, 2 Atk. 383.

The private arrangement between the executors and the banks was prejudicial to the rights of the widow as surety. Its effect was to load the dower right with a double burden. It operated as if she had signed both mortgages, and imposed upon her a burden which she never assumed.

The amount of sales of woodland under the agreement, amount to nearly \$50,000. The widow does not complain of the appropriation of the funds to the prior mortgage which she had signed; but only to the mortgages to the banks.

The widow is entitled to be exonerated out of the estate, from the loss sustained by the cutting of the timber.

If the principal and surety fund are both before the court and under its control, the court will direct the debt to be paid out of the principal fund. 1 Story's Eq., § 638; Hawley v. Bradford, 9 Paige 201.

But if the widow be regarded merely as surety, not as principal, the court will compel the transfer of credit from the subsequent to the prior mortgage. The fund was within the control of the prior creditor. He fails to enforce his right, and permits the subsequent mortgagees to obtain priority, to the prejudice of the widow.

There is no evidence of an election by the widow to take the provision under the will in lieu of dower. And no ground upon which such election can be presumed.

Though the widow, before the assignment of dower, has no legal estate in the land, she has rights which equity will "nforce. If the timber be sold, she is entitled to the interest of one third of its value during life.

By the sale of her separate property, and the appropriation of the proceeds by the husband to his own use, she became,

in equity, a creditor of the husband, and entitled to be reimbursed out of his estate. 2 Story's Eq., § 1373.

Mr. Woodhull also cited 3 White & Tudor's Lead. Cases, 739; Neimccwicz v. Gahn, 3 Paige 614; S. C. on Appeal, 11 Wend. 312; Pawlet v. Delaval, 2 Vesey, sen., 663-9; Clinton v. Hooper, 3 Bro. Ch. R. 201; Innes v. Jackson, 16 Vesey 356, 367; Tabele v. Tabele, 1 Johns. Ch. R. 45; Titus v. Neilson, 5 Johns. Ch. R. 452; Paton v. Murray, 6 Paige 474; Harrison v. Eldridge, 2 Halst. R. 411.

THE CHANCELLOR. Jesse Richards, late of the county of Burlington, died on the 13th of June, 1854, seized of a large and valuable real estate, consisting of glass works, buildings, water power, and extensive tracts of land in the counties of Burlington and Atlantic. By his will he ordered his estate to be divided between his widow and heirs, in the proportions specified by law. And if his wife desired to receive a fixed sum in lieu of dower, he directed his executors to secure to her an annuity for life, not greater than the interest of \$100,000, at the rate of six per cent. He also authorized his executors to make sale of his standing timber and lands for the payment of his debts.

At the death of the testator his estate was largely in debt. To satisfy a part of this indebtedness, two mortgages were given by his widow and heirs-at-law to the complainant, for the sum of \$37,000, upon the real estate of which the testator died seized.

The estate was also indebted to the Farmers Bank of New Jersey, and to the Burlington County Bank at Medford, in a sum exceeding \$27,000, which was secured by two mortgages upon the same real estate, executed by the heirs-at-law of the testator, but not by the widow. The complainant's mortgages were first in order of priority.

The total indebtedness secured by the mortgages is about \$64,000. The widow mortgaged her interest in the estate to secure the debts due to the complainant, amounting to \$37,000, but not the debts due to the banks.

In this state of things, on the 4th of January, 1858, an agreement was entered into between the executors and the banks, in which it is recited that the mortgaged premises consisted principally of large tracts of pine and cedar timber, and that it was hoped that by a sale of the timber and of such portions of the land as the heirs were willing to dispose of, sufficient money might be realized to satisfy the whole of the mortgage debts, with interest. And the banks, by their agents, were thereby authorized to enter upon the mortgaged premises, to sell all the standing timber fit for market, to receive the proceeds of sales, and appropriate them towards the payment of all the above mentioned mortgages, in such proportions as might be agreed upon by the holders of said mortgages respectively.

Under this agreement, sales of timber were effected to an amount exceeding \$26,000. By a subsequent arrangement between the complainant and the banks, the proceeds of these sales were applied, not to the complainant's mortgage, which was executed by the widow, but to the subsequent mortgages of the banks; the banks guaranteeing the eventual payment of the complainant's mortgage.

As between the executors and heirs-at-law of Richards and the several mortgagees, this arrangement may have been perfectly just and equitable. The estate of the heirs was liable for the payment of all the mortgage debts, and to them it was a matter of indifference which mortgage was first satisfied. As the payment of the complainant's mortgage was guaranteed by the banks, his interests were not prejudiced. But the operation of the agreement, as it is now sought to be enforced against the widow, is most inequitable She mortgaged her interest in her husband's and unjust. estate to secure the debt due to the complainant alone. operation of the arrangement is to subject her interest to the encumbrance of the entire mortgage debt of \$64,000. The mortgage was executed by her that she never assented. after her husband's death, pledging her individual interest in the lands of which he died seized to the payment of a

specified indebtedness. Beyond that, her interest in the estate of her husband is unencumbered.

She was no party to the agreement between the executors and the mortgagees for the sale of the timber. It is alleged that she knew of the existence of the agreement, and that the timber was being cut upon the mortgaged premises. But there is no evidence that she knew the terms of that agreement, or that it could operate to the prejudice of her rights. The fair presumption is that she understood and believed, as by her answer she alleges, that the proceeds of the sales of the timber were to be appropriated to the payment of the mortgages in the order of their priority.

There is no evidence of a renunciation, express or implied, by the widow, of her dower in the premises, or of an assent upon her part, to accept the pecuniary provision made by the will of her husband in lieu of her dower in the estate. So far as appears by the evidence, none of the real estate has been sold since the death of her husband, without a release of dower being executed by the widow.

There is no difficulty in affording the widow the protection she claims by her answer. All the mortgages, it is admitted, so far as they remain unsatisfied, virtually belong to the banks. The widow is entitled to have her claim for dower satisfied out of the proceeds of the sale of the land, as though the entire net proceeds of the sale of the timber had been applied toward the satisfaction of the complainant's mortgage.

I understand the law to be settled in this state, that a widow is entitled to dower in wild or unimproved lands. It was so held by the Chancellor (Williamson), in the unreported case of Doughty v. Doughty, at February Term, 1856. By the terms of the statute, she is entitled to dower in all the real estate whereof the husband was seized of an estate of inheritance at any time during coverture. She is entitled to dower in an equity of redemption. If the land be sold under the mortgage, the value of the dower in woodland is ascertained by the same rule which is applicable in any other

case. One third of the net proceeds of sale, after satisfying the mortgage debt, would be invested for the benefit of the widow, or she would receive a gross sum of equal value, calculated upon the principle of life annuities.

But so far as appears by the evidence, all the lands in question, from which the wood has been cut, were used in connection with, or as mere appendages of the glass works, or other manufactories or improvements upon the land. So far as the timber upon the Batsto tract is concerned, it was undeniably held for the benefit of the works upon that tract. It constituted a material element in the value of the improvements. Whether it added in a greater or less degree to the value of the works, the doweress is clearly entitled to the benefit of the increased value of the estate derived from that source.

It is true, as was suggested upon the argument, that she is entitled to but one third of the value of the wood cut upon the premises. That is all she asks. But to afford her the protection to which she is entitled, and to secure to her the full value of her dower in the equity of redemption, it is necessary that the entire value of the timber cut upon the premises should be credited upon the mortgage to which she became a party, and by which she pledged her individual interest in the estate, as security for the debts of the heirs.

The widow also claims, by her answer, an allowance out of the estate of her hiusband of an amount equal to the value of certain real estate which she inherited from her father during her coverture, the proceeds of the sale of which went into the hands of her husband, were invested in his business, and contributed to the accumulation of the large and valuable real estate of which he died seized. The wife's inheritance was sold and conveyed by the husband and wife prior to the year 1833, and was used by the husband without any contract for repayment. Under such circumstances, I know of no equity which the wife can claim, as against the creditors of the husband. No secret equity of the wife, however strong it might be against the estate of the husband, could avail against mortgagees, without notice of the equity.

Executors of Small v. Burnet.

Luinance v. Royie et al.

EXECUTORS OF SANTEL P. SMITE M. JOSEFE H. BURNER.

- I Where it a sorre factor upon a degree payment is set up as a defence the burden of proof is upon the defendant
- Absence from the state head no ground for postponement of a decision or for the exercise of discretion in permitting further delay.

Mr. Indramate, for companients.

Mr. Cutler, for defendant,

The Chartellor. To a sair focus upon a decree, the defendant sets up payment as a defence. The decree, its assignment to the party in whose favor the sair factor is sted out, and that a balance was due upon the decree at the time of its assignment, are clearly proved. The proof of payment is not satisfactory. The burden of proof is upon the defendant. The defence fails.

The court is asked to postpone a decision, upon the ground that the defendant now is, and for some years past has been in one of the southern states. The series furing was issued in July, 1560. The cause has been long pending, and I see no legal ground for postponement, or even for the exercise of the discretion of the court in permitting further delay.

The party is entitled to have satisfaction of the decree.

LEOPOLD LITERUER TO. THOMAS ROYLE and others.

- 3. No strange in the mode of appropriating the proceeds of sale, specifically cusposed of the decree and execution, can be made, except by opening son correcting the execution. This can only be done upon notice.
- 2. Is at it is instituted and sale of mortgaged premises, each mortgaged as autimated to be paid his principal, interest, and costs, according to his principal. It is immaterial whether the bill be filed by the first, last, or say intermediate excumbrances.

Lithauer v. Royle et al.

Mr. Ransom, for the complainant, cited Cooke v. Brown, 4 Younge & Coll. 227; Wontner v. Wright, 2 Sim. 534; White v. Bishop of Petersborough, Jacob's R. 402; Loftus v. Swift, 2 Sch. & Lef. 657; Gammon v. Stone, 1 Vesey, sen., 339.

Mr. I. W. Scudder and Mr. J. D. Miller, for defendants.

THE CHANCELLOR. The decree and execution in this case contain specific directions for the appropriation of the proceeds of sale, both to the debts and costs of the respective encumbrancers. No change in the mode of appropriating the fund can be made, except by opening and correcting the decree and altering the execution. This can only be done upon notice.

If the application had been made during the progress of the suit to mould the decree in accordance with the views of the applicant, it could not have been granted. The decree, as it now stands, is correct, and in accordance with the well settled practice of the court. The bill was filed by the last of several encumbrancers upon the mortgaged premises. The prior encumbrancers were made parties and proved their claims before the master. The decree directed the claim of each encumbrancer to be paid in the order of its priority, the complainant's debt and costs being the last in order. The amount of sales proving insufficient to satisfy the prior encumbrances, the complainant now asks that his costs shall be first paid out of the fund before the claims of the prior encumbrancers are satisfied; and that the encumbrancers on the several parcels of land sold, shall contribute to the costs in proportion to the amounts respectively realized by them.

The long established practice of the court in suits for foreclosure and the sale of mortgaged premises, has been to direct each mortgagee to be paid his principal, interest, and costs, according to his priority. It is immaterial whether the bill is filed by the first, last, or any intermediate encumbrancer; the same rule applies. The appropriation of the

Lathaner v. Boyle et al.

fund is made in advance of the sale, and without regard to the amount that may be realized. It recognizes the order of priority of the respective encumbrances as fixed, and the right of each encumbrancer to costs, as consequent upon the priority of his mortgage.

The application now made is based upon the principle that each encumbrancer should, in equity, contribute to the costs of foreclosure and sale in proportion to the benefit received, and that to this end the entire costs of all the parties should be first paid out of the proceeds of the sale.

When a fund is in court by a creditor's bill or otherwise, to be distributed among the claimants pro rata, or when a doubtful right is to be determined by settling the construction of a will, the ends of justice may be best answered by charging the costs of the proceeding upon the fund. the principle has no application to mortgagees who are claiming priority in payment under clear and unquestioned rights. The principle insisted on is this: that the prior mortgagees who come in and take the benefit, should bear, each, a proportionate share of the costs. But if the costs be first deducted from the proceeds of sale, it will not be paid ratably by the different mortgagees. The entire burden must, in case of a deficiency in the fund, fall upon some one of the encumbrancers. It may be the first, second, or last, according to the extent of the deficiency. If the whole burden fell upon the first mortgagee, there would seem to be some semblance of equity in the rule, in cases where he received the entire fund. But if the fund be sufficient to satisfy the costs and the entire debt of the first mortgagee, the whole burden will fall upon the second mortgagee, who may receive nothing, while the first mortgagee is paid in full. The rule that each mortgagee shall be paid his costs as well as his debt, in the order of priority, is not only well established, but is best adapted to secure the just rights of the parties.

If the rule is adopted, it is applicable as well to cases where the bill is filed by the first as by the last mortgagee; to the costs of defendants as well as to the costs of complain-

Lithauer v. Royle et al.

ants; and to the costs of judgment creditors and other encumbrancers as well as of mortgagees. These are often very numerous, and so far exceed the value of the mortgaged premises, that in no contingency can the great majority of the encumbrancers derive the least benefit from the proceeds of the sale. To permit these parties to burden the fund with costs would defeat the just claim of the first mortgagee, and lead to gross abuses in practice.

In the early case of Brace v. The Duchess of Marlborough, Mosely 50, there were original and cross-bills between the creditors of Sir W. Gostock, by a great variety of securities, and Brace, to whom the debtor had conveyed all his lands in trust to sell for the payment of his debts. The estate was ordered to be sold and the creditors to be paid their debts in the order of their priority. The master of the rolls thought it reasonable that the costs of all the encumbrancers should be paid, in the first place, out of the fund, on the ground that it was not a decree for redemption, in which each encumbrancer is to be paid his debt, interest, and costs, in order, but a sale by consent, which it is the interest of all parties to expedite.

The principle was subsequently applied in the case of annuities secured by demises of a rectory, where a receiver was appointed, White v. The Bishop of Peterborough, Jacob 402; and to cases of foreclosure and sale of mortgaged premises, where the bill was filed by the first mortgagee against subsequent encumbrancers. Wontner v. Wright, 2 Simons 534; Cooke v. Brown, 4 Younge & Coll. Ex. Eq. 227.

A different practice, however, was adopted in Upperton v. Harrison, 7 Simons 444, where the court refused to allow a subsequent encumbrancer his costs, until the claim of the first mortgagee was settled. It was stated by counsel in that case, that the practice of the court was to direct each mortgagee to be paid his principal, interest, and costs, according to his priority; and the cases of Davies v. Topp, Seaton on Decrees 97; Wride v. Clarke, Ibid. 105; Geary v. Geary, Ibid. 173; and Wakeham v. Lome, Ibid. 275,

cited by the reporter in the note to 7 Simons 444, will be found to support the statement of counsel.

It was stated on the argument of Upperton v. Harrison, that the case of Kenebel v. Scrafton, 13 Ves. 370, cited in support of the present application, was incorrectly reported, as that was a creditor's bill, and the mortgagees were not parties to it. But if the case be correctly reported, it affords no countenance to the present application. The bill was filed by the first mortgagee, who was clearly entitled to have his costs first paid out of the fund. The application was resisted by the third mortgagee. The case would seem to apply to the complainant's costs only, and it was so understood by Chancellor Kent. 6 Johns. Ch. 435. The authorities in the English court are conflicting.

By the rule and course of practice of the Court of Chancery in New York, a subsequent encumbrancer is not entitled to his costs till the debt and costs of prior encumbrancers are satisfied. Farmer's Loan and Trust Co. v. Millard, 9 Paige 620; Boyd v. Dodge, 10 Paige 42; Mayer v. Salisbury, 1 Barbour's Ch. R. 546; Smack v. Duncan, 4 Sandf. Ch. R. 621.

The application must be denied.

CYRUS M. FREEMAN vs. EDWIN.R. FREEMAN and others.

- The title of a mortgagee to chattels mortgaged, is absolute at law after forfeiture, and he may sell them for the satisfaction of his debt without the aid of a Court of Chancery.
- 2. A mortgagee of chattels may maintain an action at law for the conversion of the goods, although not in his actual possession.
- 3. A mortgagee has the right to come into equity to obtain a foreclosure of the equity of redemption and a sale of the chattels, and also to protect the property from conversion or destruction until a sale be effected.
- 4. If the mortgages retain the chattels, they are always liable to redemption by the mortgagor. His only right to them is to satisfy his debt. When that is satisfied, his title ceases.

- 5. The conduct and fairness of a sale of chattels by the mortgagee or pledgee, and the rights acquired under such sale, are always open to investigation at the instance of the mortgager or pledger. A sale under judicial sanction is therefore safer, and where the amount is large, advisable.
- 6. The mortgagee has the right to foreclose his mortgage. He is not bound to incur the risk of selling the property without the sanction of a decree, and he may, it seems, come into a court of equity for the protection of his rights as mortgagee, even before a forfeiture has been incurred.
- 7. Where an injunction has been issued at the prayer of the mortgagee, to restrain a sale or removal of chattels mortgaged, and the payment of the proceeds of sales already made to the plaintiff in execution, if the mortgagee has assented to a sale of the chattels, and they have in fact all been sold, the injunction will not be continued to prevent their removal, or to restrain the sheriff from paying over the proceeds.

The cause was heard upon a motion to dissolve the injunction and to dismiss the bill.

Mr. Vanatta, (with whom was Mr. Leport) for defendants, in support of the motion.

The complainant complains of no wrong done, or right withheld, which this court can redress or restore. The bond from the mortgager to the complainant was due, and the title of the mortgagee to the goods absolute, prior to the filing of the bill. There is no necessity for a foreclosure of the mortgage. Stewart v. Slater, 6 Duer 99.

The complainant had a perfect remedy at law. He complains of acts which he himself permitted to be done. He stood by while the sale was being made, and gave notice to the sheriff to retain the proceeds of the sale. He elected his tribunal for the satisfaction of his rights, by notifying the sheriff to bring the money into court.

The bill shows no title in the mortgagee, nor does it allege any right which entitles him to a position in this court. The mortgage is void, because it does not appear that the mortgagee was ever in possession of the chattels. There is nothing in the bill to show why he had not taken possession of the property. Runyon v. Groshon, 1 Beas. 86; Miller v. Pancoast, 5 Dutcher 250.

Mr. J. H. Stone, for complainant, contra.

In this state, the practice in chattel mortgages is either to foreclose the mortgage, or make sale of the chattels. The mortgagee may sell them and apply the proceeds to his debt, and pay over the surplus to the mortgagor.

While in possession of the mortgagor, they may be levied on as his property; they cannot be levied upon as the property of the mortgagee. Doughten v. Gray, 2 Stockt. 324.

The complainant may come into this court—1. By reason of his mortgage. 2. By reason of his equitable lien on the proceeds of sale. He has a clear right to foreclose his mortgage, if he so elect. He has an equitable lien on the proceeds of the sale of the chattels. Chapman v. Hunt, 2 Beas. 370.

The mortgaged has not an exclusive absolute right to the chattels mortgaged. All he can do is to take possession and sell them. This right the mortgaged cannot exercise against the claim of the sheriff under execution.

The answer does not deny the whole equity of the bill, nor have all the defendants answered. To a portion, the denial is merely technical. Everly v. Rice, 3 Green's Ch. R. 553; Scull v. Reeves, 2 Green's Ch. R. 84, 131; Adams' Equity 732, notes.

The answer is new matter in avoidance of the charges of the bill, and constitutes no ground for a dissolution of the injunction. *Green* v. *Pallas*, 1 *Beas*. 267.

This court may settle the whole equity, and no injury can result to the defendants.

THE CHANCELLOR. The bill in this case was filed by the mortgagee in a chattel mortgage, for the foreclosure of the equity of redemption and the sale of the chattels. The goods had been levied upon by virtue of an execution at law, and part of them sold. An injunction was issued, at the prayer of the complainant, to restrain the sale or removal of the goods, and from paying over the proceeds of the sales already

made, to the plaintiff in execution. The plaintiff in execution having answered the bill, now moves to dissolve the injunction.

It is objected that there is no equity in the complainant's bill, because the complainant may have complete and adequate relief at law. It is true that the title of the mortgagee to chattels mortgaged is absolute at law after forfeiture, and that he may sell them for the satisfaction of his debt, without the aid of a Court of Chancery. Hall v. Bellows, 3 Stockt. 334; Long Dock Co. v. Mallery, 1 Beas. 94; Chapman v. Hunt, 2 Beas. 370; 4 Kent's Com. 139; Story on Bail. § 310, and note 4.

It is also true that he may maintain an action at law against a wrong-doer for the conversion of the goods, although not in the actual possession of the mortgagee. Barrow v. Paxton, 5 Johns. R. 258; Brown v. Bement, 8 Ibid. 96; Stewart v. Slater, 6 Duer 99; Fenn v. Bittleston, 7 Exch. 182. Nevertheless the right of a mortgagee of chattels to come into equity to obtain a foreclosure of the equity of redemption and a sale of the chattels, and also to protect the property from conversion or destruction until a sale be effected, is well settled. Hall v. Bellows, 3 Stockt. 334; Runyon v. Groshon, 1 Beas. 86.

In many cases the remedy in equity is more complete and effectual than at law. If the mortgagee retain the chattels, they are always liable to redemption by the mortgagor. His only right to them is to satisfy his debt. When that is satisfied, his title ceases. Doughten v. Gray, 2 Stockt. 323; Charter v. Stevens, 3 Denio 33.

A sale of the chattels by a mortgagee or pledgee, in the absence of statutory regulations, is attended with some difficulty and embarrassment. The conduct and fairness of the sale, and the rights acquired under it, are always open to investigation at the instance of the mortgagor or pledgor. Morris Canal and Banking Co. v. Fisher, 1 Stockt. 667, 687-9; Same v. Lewis, 1 Beas. 323. On these accounts a sale under judicial sanction is safer, and where the amount is large, advisable.

It is the right of the mortgagee to foreclose his mortgage. He is not bound to incur the risk of selling the property without the sanction of a decree, and he may, it seems, come into a court of equity for the protection of his rights as mortgagee, even before a forfeiture has been incurred. Dry Dock Company v. Mallery, 1 Beasley 84, 431.

Of the right of the mortgagee to invoke the protection of the court, I entertain no doubt. The only question is, whether, upon the admitted facts of the case as they now appear before the court, the injunction, as a matter of sound discretion, should be continued to the hearing, or whether the complainant should be left to his remedy at law. mortgagor and mortgagee are brothers. The property mortgaged was levied upon under an execution, not against the mortgagor, but against the father, in whose possession it was at the time of the levy. The mortgagor forbid the sale, claiming the property as his. The mortgagee, who was also present by his attorney, did not object to the sale, but gave notice to the sheriff to pay into the court, from which the execution issued, out of the proceeds of the sale, the amount of his mortgage debt. He thereby tacitly assented to the He can have, therefore, no claim in equity to restrain the sheriff from removing the goods so sold.

The bill alleged that a part of the goods were sold by the sheriff, and that he threatened to sell the remainder. The injunction restrained him from removing or selling any of the goods, and in case any of the goods so sold were delivered to the purchaser, it also restrained him from paying the proceeds thereof to the plaintiff in execution. It also appears that all the goods levied upon by the sheriff, with the exception of a single article of small value, have been sold. There is no propriety, therefore, in continuing the injunction for the purpose of restraining either the removal of the goods sold or the sale of the remainder. Nor do I see any necessity of continuing it to restrain the sheriff from paying over the proceeds of the sale.

The real matter in dispute is not the bona fides of the

Marlatt v. Perrine.

mortgage to the complainant, but whether the property belongs to the defendant in execution, or to the mortgagor. If the property did not belong to the defendant, but to the mortgagor, it is clear that the levy and sale by the sheriff was illegal, and he is liable in damages at law. The remedy at law as between the execution creditor and the mortgagor or mortgagee is complete. To withdraw that question from the ordinary legal tribunals under color of enforcing the rights of the mortgagee, especially where the amount in dispute is small, will not conduce to the ends of justice.

The sheriff now holds in his hands the proceeds of the sale of the chattels mortgaged, under a notice from the mortgagee to pay it into the court out of which the execution issued. If that court under the circumstances, on a motion to pay over the money to the mortgagor or mortgagee, will take cognizance of the matter in dispute, the controversy may be settled with little delay or expense. If the court should refuse to give that relief, the party is not deprived of his remedy at law. It cannot be that the mortgagee, by mistaking his true remedy in supposing that the court would protect him upon summary motion, can be deprived of his just rights either at law or in equity.

The injunction is dissolved without costs.

BENJAMIN MARLATT vs. ALFRED PERRINE.

^{1.} A judgment entered by confession upon a bond with warrant of atterney, is within the provisions of the statute, (Nix. Dig. 97, § 11), requiring the defendant to give security before the issuing of an injunction to stay proceedings at law in any personal action after verdict or judgment.

^{2.} Where an injunction is granted contrary to the statute, the party is entitled to summary relief. He will not be put to his motion to dissolve.

^{3.} Injunction ordered to be set aside with costs, unless complainant within three days deposit the money, or give the security required by the statute; in which event the injunction to stand.

Marlatt v. Perrine.

Upon filing the bill in this cause, an injunction issued pursuant to the prayer thereof. The defendant having answered the bill, now moves to dissolve the injunction on the ground of irregularity; it having been issued without the security required by the statute.

Mr. E. T. Green, for defendant, in support of the motion.

Mr. J. Wilson, for complainant, contra.

THE CHANCELLOR. The complainant, by his bill, seeks relief against a judgment recovered against him upon bond with warrant of attorney to confess judgment, and to enjoin a sale under an execution issued upon the judgment. The injunction issued without the security required by the statute. Nix. Dig. 97, § 11.

The statute declares that no injunction shall issue to stay proceedings at law in any personal action after verdict or judgment, on the application of a defendant in the said proceedings at law, unless a deposit be made, or security given, in compliance with the terms of the act. The only question is, whether a judgment, entered by confession upon a bond with warrant of attorney, is within the requirements of the statute.

It is clearly within the terms of the act. A judgment entered by confession upon bond with warrant of attorney, is a judgment in a personal action. A proceeding under the act entitled "an act directing the mode of entering judgments on bonds with warrants of attorney to confess judgments," is an action of debt. It is so styled in the act itself. Section 1. It falls within every recognized definition of an action. It is a remedial instrument of justice, whereby redress is obtained for a right withhield. So it is the method prescribed by statute and by the rules and practice of the court for the recovery of a debt due. 3 Bl. Com. 116, 117; 1 Sellon's Prac., Introduction 73.

If the judgment had been entered by confession in open

court, according to the recognized form of the common law, it would clearly have been a judgment in a personal action. That the judgment is entered in the form prescribed by the statute does not alter the substance of the thing. Though I find no adjudicated case in this state, such is believed to have been the construction uniformly given to the statute. In New York, under a similar statute, it is well settled that a judgment obtained by confession upon a bond with warrant of attorney, is within its provisions. 2 Rev. Stat. N. Y. 189, § 141; 1 Eden on Inj. 144, note 2; Farrington v. Freeman, 2 Edw. Ch. R. 572; Christie v. Bogardus, 1 Barb. Ch. R. 167.

The statute is imperative. There is no authority to issue the injunction, except upon the terms prescribed by the statute. The party will not be put to his motion to dissolve the injunction. It will be set aside for irregularity. Where an injunction is granted contrary to the statute, the party is entitled to summary relief. Jenkins v. Wilde, 2 Paige 394.

The injunction must be set aside with costs, unless the complainant within three days deposit the money, or give the security required by the statute, in which event the injunction to stand.

This course was adopted in Cook v. Dickerson, 2 Sandf. S. C. R. 691, and is warranted by a fair interpretation of the statute. If the injunction were set aside, a new one would be granted immediately upon the complainant's giving the requisite security,

Peter Conover and Lucius Hart vs. Franklin Smith and others.

^{1.} A lessee having made permanent improvements upon the demised premises under a covenant that he shall be repaid their appraised value at the expiration of the term, may seek relief in equity as well as at law. The value of the improvements constitutes an equitable lien upon the premises, which alone entitles the party to relief in equity.

- 2 If the lessee covenant for him and his assigns, that they will make a new wall upon a part of the thing demised, it shall bind the assignee. But if the thing to be done, be merely collateral to the land, and doth not touch or concern the thing demised in any sort, the assignee shall not be charged, though he be named in the covenant. The covenant is a mere personal covenant not affecting the land demised.
- 3. A covenant by the lessor to pay his lessee the value of machinery, fixtures, and other necessary improvements, authorized to be substituted in the place of those already in the buildings at the time of the lease, enures to the benefit of the assignee of the lessee, though the word "assigns" be omitted. Such improvements constitute an equitable lien upon the premises which can be enforced only in this court.

The bill states that by an agreement under seal, bearing date on the 28th of June, 1853, between Miles C. Smith and others of the one part, and Andrew Snowhill and John Priestley of the other part, the parties of the first part demised to the parties of the second part, certain lots of land, mills, buildings, and water power at New Brunswick, for the term of ten years, from the first day of May, 1853, for the yearly rent of \$1200, payable quarterly. And it was among other things, in and by the said agreement, covenanted and agreed between the said parties, that the lessees might enter at once upon the said premises, and remove all the machinery in said mills not adapted for the business of manufacturing paper, and to substitute in the place of the machinery so removed, such other machinery and fixtures as might be necessary or proper for carrying on their contemplated business; that at the expiration of the lease on the first of May, 1863, the lessees should peaceably yield up the possession of the said premises; and if the parties to the agreement, or those who might then legally represent them, could not agree upon the value of the machinery, fixtures, and other necessary improvements made and substituted by the lessees in the stead of the existing machinery in said mills, each party should choose an arbitrator, which arbitrators, (or if they could not agree, they with an umpire by them to be chosen), should make an appraisement and valuation of all the substituted machinery, fixtures, and improvements made by the

lessees, and upon the payment of the amount of such valuation and appraisement, the machinery, fixtures, and improvements so appraised, should become the property of the lessors or their legal representatives. The lessees entered into possession, and substituted other machinery and fixtures, and made improvements at a large cost, which still remain in said mills, and have greatly enhanced the value thereof. The complainants claim, by assignment and transfer, to be invested with all the rights of the original lessees. terest of Miles Smith, one of the lessors in the demised premises, has been conveyed, by sale under judgment and execution at law, to Reve A. DeRussy, and the reversionary interest of the lessors has been, and is largely encumbered by mortgages and judgments. The machinery, fixtures, and improvements substituted and made by the lessees have also been heavily encumbered by mortgages.

The bill further states that the complainants who claim to be invested with the rights of the original lessees, being unable, upon the expiration of the term, to agree with the lessors and with DeRussy, in regard to the value of the machinery, fixtures, and improvements substituted and made, as aforesaid, in and upon the demised premises, selected an arbitrator on their part, in pursuance of the terms of the lease, and gave notice thereof to the lessors, but that no arbitrator has been nominated by them.

The bill prays that the premises may be decreed to be subject to an equitable lien for the value of the machinery, fixtures, and improvements substituted in the stead of the machinery in the mills at the date of the lease; that the true value thereof may be ascertained under the direction of the court; that the premises may be sold under the order of the court, and the proceeds of the sale apportioned among the parties interested according to equity; and that the owners may be restrained from conveying the premises, or removing the fixtures or machinery, or wasting the same, and from bringing suit at law for rent or other compensation for the rent of said premises since the expiration of the lease.

Ł.

Several of the defendants have answered. The case is now brought on for hearing upon the bill and the answer of DeBussy and wife, two of the defendants, for the disposition of certain questions raised by the answer.

Mr. C. Parker, for complainants.

Mr. R. Adrain, for defendants.

THE CHANCELLOR. It is objected that there is no equity in the complainants' bill to entitle them to the relief prayed It is not denied that a lessee, having made permanent improvements upon the demised premises, under a covenant that he shall be repaid their appraised value at the expiration of the term, may seek relief in equity as well as at law. It is clear that he may. Copper v. Wells, Saxton 10; Berry v. Ex'rs of Van Winkle, 1 Green's Ch. R. 269. The value of the improvements constitutes an equitable lien upon the premises, which alone entitles the party to relief in equity. Other grounds of equitable relief may supervene. An appraisement pursuant to the terms of the covenant may have been rendered impracticable, or, as in this case, there may be conflicting questions of law and equity touching the rights and interests of lessors and lessees, their assignees or creditors, which renders relief at law inadequate or ineffectual.

But the objection is that though the lessee be entitled to relief, yet under the terms of the lease in this case, the assignee can maintain no action either at law or in equity for the value of the improvements. The lease itself is in the usual form to the lessees, their executors, administrators, and assigns. But the permission to remove the machinery then upon the premises, and substitute other machinery and fixtures, is given to the lessees, without mentioning their assigns. And so the covenant to pay the value of the machinery and fixtures at the end of the term, is in terms a mutual agreement between the parties to the lease and in favor of the legal representatives of the lessees, but not of their assigns.

Upon a covenant which runs with the land, an action lies for or against the assignee at the common law, although the assignees be not named in the covenant. It was resolved in Spencer's case, 3 Coke's Rep. 16, when the covenant extends to a thing in esse, parcel of the demise, the thing to be done by force of the covenant is quodammodo annexed and appurtenant to the thing demised, and shall go with the land and bind the assignee, although he be not bound by express But when the covenant extends to a thing not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being; as if the lessee covenants to repair the houses demised to him during the term, that is parcel of the contract and extends to the support of the thing demised, and therefore is quodammodo annexed, appurtenant to the houses, and shall bind the assignee, although he be not bound expressly by But if the covenant concerns a thing not in the covenant. esse at the time of the demise made, but to be built after, as to build a house or wall, this shall not bind the assignee, if not named, for the law will not annex the covenant to a thing which hath no being.

If the lessee covenant for him and his assigns, that they will make a new wall upon a part of the thing demised, it shall bind the assignee. But if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, then the assignee shall not be charged, though he be named in the covenant. The covenant is a mere personal covenant, not affecting the land demised. Spencer's Case, 3 Coke's R. 16, Res. 1 and 2; 1 Smith's Leading Cases 22; Lametti v. Anderson, 6 Cowen 302; Thompson v. Rose, 8 Cowen 266; Tallman v. Coffin, 4 Comst. 134; Taylor's Land. & Tenant, § 260.

In Bally v. Wells, 3 Wilson 25, after a statement of the resolutions in Spencer's case, the principle is thus stated by the court: "There must always be a privity between the plaintiff and defendant, to make the defendant liable to an action of covenant. The covenant must respect the thing

granted or demised. When the thing to be done, or omitted to be done, concerns the lands or estate, that is the medium which creates the privity between the plaintiff and defendant. As if lessee for life covenants for him, his executors and administrators, to build a wall within his term, and afterwards he assigns over his estate, the grantee of the reversion shall have covenant against the assignees, and notwithstanding the covenant wants the word assigns. Yet every assignee by accepting the possession, hath made himself subject to all covenants concerning the land, but not to collateral covenants; and covenants of repairs and building walls or houses, are covenants inherent to the land, with which the assignee, without the special words, shall be charged."

This is a very clear and intelligible statement of the legal principle, and varies from the resolutions in Spencer's case in this, that it makes no distinction in the effect of the covenant, whether it relate to the repairs of an existing building or to the erection of a new one, provided it be upon the demised premises, the land or estate being the medium which creates the privity between the plaintiff and defendant. that the assignee of the lessee is bound by the covenant, whether it relate to the erection of a new building or the repairs of an old one. It is worthy of notice that the opinion of the court, both in the statement of the resolution in Spencer's case and in the subsequent enunciation of the principle growing out of it, disregards the distinction between the erection and repairs of a building. And the opinion is entitled to the more consideration, as it emanates from a court over which Chief Justice Wilmot presided, and is preserved in a volume of reports, which is justiy characterized as a very accurate repository of judicial decisions.

If this be a true statement of the principle, the covenant of the lessor in this case to pay for the improvements, clearly enures to the benefit of the assignee. For, if the assignee was authorized or bound by the terms of the covenant to change the machinery, the covenant to pay for it must enure

to his benefit. But, adopting the statement of the principle as contained in Spencer's case, to be the true one, the question still remains—is not the covenant in this case within the principle extending the operation of the covenant to the assignee, though not named? The covenant respects not the erection of new buildings, but alterations and improvements in existing buildings; a change of one set of machinery and fixtures for another in the buildings demised. In the language of the resolution in Spencer's case, it extends to the support of the thing demised, and therefore is quodammodo annexed, appurtenant to the buildings.

If it be objected that the machinery to be paid for is new, and formed no part of the demised premises at the time of the demise, it may be answered that the materials and labor which constitute the repairs, formed no part of the demised premises at the time of the demise, but that the covenant in the one case, as well as in the other, concerns the thing demised, and is not collateral to it.

It seems to me, therefore, that this covenant extends to the assignee, though he is not expressly named in the contract, and that an action at law as well as in equity may be maintained by the assignee to enforce it.

But if it be conceded that by the strict rules of the common law the covenant does not affect the assignee, and that no action at law could be maintained upon it in his name, it does not follow that he is without relief in equity. It is admitted that the machinery and fixtures were not substituted by the lessees themselves, but by the assignees. The machinery in the mills at the time of the demise was removed, sold, and the price paid to the lessors, and the new machinery was substituted, and improvements made, as provided in the contract. The complainants are now before the court asking compensation for valuable improvements made upon the demised premises during the continuance of the term, with the knowledge and consent of the lessors. These improvements constitute an equitable lien upon the premises which can be enforced only in this court. It was upon this ground that

Conover et al. v. Smith et al.

relief was granted in the cases of Copper v. Wells, and Berry v. Ex'rs of Van Winkle, already referred to. The design of the complainants' bill is to enforce this lien, and to secure to the complainants the value of the substituted machinery and fixtures at the expiration of the term.

In this aspect of the case it does not seem to be material whether the assignees, at the expiration of the lease, unlawfully refused to surrender the premises, or whether they were then in a situation to transfer the property clear of encumbrance, or whether, from this or any other cause, the defendants were not bound to join in the appointment of arbitrators. If the complainants were asking the appointment of an arbitrator, with a view to the specific performance of the contract, a different question would be presented. It is clear that the court would not, under the circumstances, appoint an arbitrator, or enforce the specific performance of the contract. Copper v. Wells, Saxton 14; McKibbin v. Brown, 1 McCarter 13.

Whatever effect the unlawful refusal of the complainants to surrender possession, or their inability to transfer the substituted machinery to the defendants, may have upon their rights or interests, they constitute no obstacle to the complainants' suit, nor do they affect the equity of the bill.

The lessees are authorized by the terms of the contract to remove the machinery from the mills upon the premises at the date of the demise, and to substitute in the place thereof, such other machinery and fixtures as might be necessary or proper for carrying on their contemplated business. Whether the brick building claimed to have been erected upon the premises is within the contract, or constitutes a matter for compensation, will depend upon the character of the building, and the use to which it was applied, and this will form a proper subject of inquiry before the master.

EDWARD KEARNEY, executor of General Philip Kearney, deceased, vs. Agnes Kearney and others.

- 1. A testator, by his will, gave and bequeathed as follows: "I give and bequeath to Susan K. the sum of \$10,000, to be paid to her on her reaching the age of sixteen years." Held, that the legatee takes a vested interest in the legacy, liable to be defeated by her death before reaching the age of sixteen years; and that she is entitled to interest on the legacy from the death of the testator.
- 2. The codicil to the will contained the following clause: "I do hereby devise to my daughter, Virginia, lately born to me, \$500 per annum during her natural life, to be paid to her quarterly in advance by my executor, commencing with her attaining her fifteenth year." Held, that Virginia is not entitled to maintenance out of the testator's estate; she has no interest in the estate beyond the annuity itself, which cannot be anticipated.
- 3. The codicil also contained the following clause: "It is my will that my wife shall have the right to occupy and possess my estate called Bellegrove, in New Jersey, as well as all my furniture, household goods, silver, books, paintings, statuary, and other works in the fine arts, there or elsewhere, to hold to her during her natural life and widowhood." Held, that this is an estate of freehold with all its rights and incidents; the gift is of the right to possess the property, real and personal, during the life of the widow, if she remain unmarried; and if she marry, during widowhood only. It necessarily involves the right to use the personal property upon the estate or elsewhere, at her pleasure. The widow is bound to repair only to the extent of preventing waste.
- 4. A direction to an executor, "as soon as convenient after the testator's death, to have the residuary estate allotted and set off in separate portions, and to hold the same severally in trust until the coming of age of each of the sons, and as each son comes of age, to execute and deliver to him a sufficient fee simple deed therefor," does not vest in the executor an estate in fee to be held by him in trust for the purposes specified in the will, where the manifest design of the testator was that the residuary estate should vest in his surviving son in possession and enjoyment, upon his attaining the age of twenty-one years.
- 5. If the trustee deem that the interest of his cestui que trust, the retanainderman, require repairs to the estate before he comes of age, he will be authorized to repair.
- 6. The tenant for life and remainderman, each pay insurance for their respective interests.
- 7. An annuity or which there is no consideration save natural love and affection, and which the testator was under no legal obligation to pay,

creates no charge upon the estate. The fact that it was paid by the testator for a long course of years, and that he gave written instructions to his agent for its punctual payment while in life, creates no legal or equitable obligation to continue it after his death.

The bill in this cause was filed by the executor of General Philip Kearney, to determine the interest of his widow and children in his estate under certain clauses in the will; and also the rights and liabilities of the tenant for life and remainderman. The executor seeks the direction of the court in the execution of the trust, without being hostile to any of the parties in interest.

Mr. Parker and Mr. Keasbey, for the executor, cited 2 P. Wms. 21; 3 Atk. 438; 2 Johns. Ch. R. 614; 3 Atk. 716; 3 Vesey 10; 1 Eq. Cases Ab. 301; 1 Dick. 310; 3 Russell 263; 3 Bradf. 198; 5 Binney 477; 4 Rawle 113-19; Saxton 43; 2 Beas. 138; 1 C. E. Green 243; 1 Sumner 1; 2 Younge & Coll. 181; 4 Younge & Coll. 221; Ambler 395; 2 Desaus. 65; 1 Cruise Dig. 123; Smith's Land. & Tenant 191.

Mr. A. O. Zabriskie, for the widow and daughters, cited 4 Zab. 686; 2 Williams on Executors 1288; 2 Roper on Legacies 1257-61; 1 Dick. 310; 3 Russell 263; 1 P. Wms. 783; 1 Roberts on Wills 460-1; 2 Atk. 216; 8 Paige 331; 5 Barb. 324; 20 Wend. 53; 11 Wend. 298; 2 Edw. Ch. R. 523; 3 Sim. 398; 9 Paige 107; 11 Vesey 1; 1 Bro. Ch. R. 268.

Mr. Frelinghuysen, Attorney General, for John Watts Kearney, cited 3 Atk. 101; 2 Williams on Executors 1288; 1 Cox's Ch. R. 433; 14 Serg. & Rawle 238; 2 Sneed 512; 10 Hump. 30; 1 Cruise Dig. 104-5.

THE CHANCELLOR. The will of the testator, General Philip Kearney, among other provisions, contains the following gifts and directions, viz.

To his wife, Agnes, the sum of \$3000 per annum in lieu f dower. To his son, Archibald, a devise of real, and a ift of personal estate, equal in value and amount to the real nd personal estate previously settled upon his son, John Vatts, in order to equalize the shares of his two sons. To is daughter, Susan, the sum of \$10,000, to be paid to her a her reaching the age of sixteen years.

All the rest, residue, and remainder of his present or after equired estate, he gave, devised, and bequeathed to his two ons, John Watts and Archibald Kennedy, to be equally vided between them, to be allotted and set off in separate ortions by his executors, as soon as conveniently might be ter his death; and to be held by them severally in trust atil the coming of age of his sons, and as each son came of se, to execute and deliver to him a sufficient fee simple deed herefor. In the event of the death of either of his sons ader age and without issue, he gave all the residuary estate the surviving son; and if both should die under age, and thout issue, he gave all the residuary estate in fee simple his eldest male grandchild then living, on condition that take the name of Kearney in lieu of his patronymic.

He directed his executor to allow and pay to the guardians each of his sons \$600 a year, payable semi-annually, atil each of them comes of age, to be deducted from the inme of his part of the estate.

He gave his executors all such powers to sell, mortgage, release any part of his estate, and generally to do all such the stand things as may be necessary for the good management of his estate and the fulfillment of the testator's intenious in the premises.

He appointed his cousin, Edward Kearney, of the city of Sew York, executor and trustee of the will.

The testator subsequently made and published a codicil to his will, as follows:

"My son, Archibald Kennedy, having departed this life, and another daughter being born to me, I do hereby make the following alterations and additions to my will:

Vol. II.

"First. It is my will that my wife, Agnes Maxwell, shall have the right to occupy and possess my estate, called Bellegrove, in New Jersey, as well as all my furniture, household goods, silver, books, paintings, statuary, and other works in the fine arts, there or elsewhere, to hold to her during her natural life and widowhood. Should she at any time surrender its possession to my son, John Watts, to whom by reason of the death of my son, Archibald Kennedy, the same will go, she shall receive, for her life, the sum of five humdred dollars yearly, as an equivalent.

tors to pay to my said wife, Agnes Maxwell, one thousand dollars yearly, during her life, in addition to what is hereigand by said will devised to her, to be paid as directed in my said will, in item first thereof, and on the same conditions therein expressed; my object being to enable her to reside in the place where our cherished son, Archibald Kennedy, diedal, and meet its expenses. But whether she reside there or not, it is my intention that she shall receive said additionally yearly sum of one thousand dollars.

"Second. I likewise bequeath, give, and order my execu-

"Third. I do hereby devise to my daughter, Virginia, lately born to me, five hundred dollars per annum during her natural life, to be paid to her quarterly in advance, by my executor, commencing with her attaining her fifteenth year."

The will is dated at Paris, France, on the * * * day of January, 1861, and is in the handwriting of the testator. The codicil is dated at the city of Washington, on the seventeenth of March, 1862.

The testator fell in battle on the first of September, 1862, and the will and codicil were thereafter duly admitted to probate by the surrogate of the county of Hudson.

The executor and trustee asks a judicial construction of the will, and the direction of the court in the execution of his trust.

The testator left at his decease two daughters, Susan and Virginia, each under the age of fourteen years. By his will

he gave as follows: "I give and bequeath to Susan Kearney, my child by the aforesaid Agnes Maxwell, the sum of \$10,000, to be paid to her on her reaching the age of sixteen years. If, however, she die before that age, this legacy to become part of my residuary estate."

The codicil contains the following clause: "I do hereby devise to my daughter, Virginia, lately born to me, \$500 per annum, during her natural life, to be paid to her quarterly in advance, by my executor, commencing with her attaining her fifteenth year."

The will contains no provision for the support or education of either of these daughters until their legacies are payable. Their mother, as guardian, claims an allowance for their present support,

The legatee takes a vested interest in the legacy of \$10,-000, liable to be defeated by her death before reaching the age of sixteen years. If she die before that time, the legacy As a general rule, legacies, like sinks into the residue. clebts, draw interest from the time they are payable. when the legatee is an infant child of the testator, and no provision is made for its support before the time fixed for the payment of the legacy, interest on the legacy will be allowed from the testator's death, by way of maintenance. 1 Eq. Cas. Ab. 301; Incledon v. Northcote, 3 Atk. 438; Harvey v. Harvey, 2 P. Wms. 21; Lupton v. Lupton, 2 Johns. Ch. R. 614; Jordan v. Clark, 1 C. E. Green 243. The exception extends only to the infant child of the testator, or. to one toward whom the testator has assumed a paternal It extends to no other relation, nor even to an relation. adult child. It is founded upon the natural obligation of the father to provide a present support for his infant children, and upon his presumed intention not to deprive Crickett v. Dolby, 3 Vescy 10; them of such support. Dawes v. Swan, 4 Mass. 215; Sullivan v. Winthrop, 1 Sumner 1; Roberts v. Malin, 5 Indiana 18; Brinkerhoff v. Merselis' Ex'rs, 4 Zab. 680; 2 Roper on Legacies, Chap. 20, 1246. As regards the legacy to Susan,

there is no doubt. She is entitled to interest on the legacy from the death of the testator.

It is arged that the annuity to Virginia falls within the

- me trin itie, and that she is entitled to the annuity from the death of the father. It is certain that the necessity for meintenance, and the obligation of the father to provide for it, is the same in regard to both the legatees. But the case of an annuity does not fall within the principle upon which the court gives interest mon a legacy before the time when, In the terms of the will, it is made payable. It is admitted to there is no tree lent for such an allowance in the case of an annutant. There is no fund or principal money given to the intuiting out of which the annuity is to be paid. Such a relegion, vested or contingent, and no interest in the estate lovered the annuity itself. The will fixes with The soft the time at which the payment of the annuity I have more not. There is no ream for the presumption that the test at a intensial it should commence at an earlier origin. It is suggested that the annuity is given to her tiring him natural life, and must, therefore, as in other - s. sommence from the death of the testator, and that by the letter choise of the bequest, the testator simply intended to declare that the annuity should be paid to the annuitant in person after she attained her fifteenth year, and that previous to that time it should be expended for her support and -ducation. But the obvious design of the testator was that , the annuity should commence with the annuitant's attaining her fifteenth year, and that the payments should be made smarterly in advance. That is the natural import of the bequest. It is moreover highly improbable that the testator should have desired or intended that the annuity should be paid into the hands of a child only fifteen years of age, rather than to her mother or guardian. But it is insisted that this court may, even against the clearly expressed intention of the testator, make provision for a child out of his As a general principle, I think that proposition **-cannot** be supported.

It is well settled that a court of equity will, where it appears necessary for the support or education of an infant, anticipate his income, whether secured by will or by deed of settlement, and for this purpose they will even break into the principal of the fund. And in this class of cases the allowance will be made in direct contradiction to the terms of the will or deed. It is not a question of construction. It respects not the right of property, but the time of enjoy-If the court deem it necessary for the support and education of an infant, or most for his advantage, that interest which has been directed to accumulate, or that principal payable at a future day, should be applied for that purpose, it will be so ordered; and so a larger allowance will be made for an infant's support than is provided by the tes-But these cases turn, not upon the true construction of the will, or the presumed intent of the testator, but upon the power and practice of the court to control the estate of the infant for his benefit.

But the allowance of interest to an infant child of the testator, before the time fixed for the payment of the legacy, is mainly, if not exclusively, a question of construction. The court considers the parent to be under an obligation to provide not only a future but a present maintenance for his child, and therefore holds that he could have postponed the time of the payment only from the incapacity of the child to receive, but that he never meant to deprive him of the fruit of the legacy; which fruit is the only maintenance, and which maintenance he was bound to provide. Crickett v. Dolly, 3 Vesey 13.

"If," says Chancellor Kent, "there be no other provision, the legacy carries interest immediately, on the presumption that the parent must have intended that the child should in the meantime be maintained at his expense." Lupton v. Lupton, 2 Johns. Ch. R. 628.

And Lord Redesdale says: "In the case of a father and a child having no other provision, it is considered a necessary implication that the legacy shall bear interest, because

he, being bound to provide maintenance for his child, and having made provision by a legacy payable at a future day, must be presumed to intend that the child should be supported in the meantime; but this implication is ousted, if he provides any maintenance for the child, however small the maintenance and however large the legacy." Ellis v. Ellis, 1 Sch. & Lef. 5.

The whole current of authority shows that the settled rule of construction, that the legacy draws interest from the death of the testator, has been adopted from a regard to the presumed intention of the testator.

It has been remarked by eminent judges, that courtsoof justice have gone great lengths, or in the language of Lord Hardwicke, "have made a great stretch," to provide a maintenance for infants who are entitled to legacies payable at a future time. Hearle v. Greenbank, 3 Atk. 717; Miles v. Executors of Wister, 5 Binney 477. Interest has been allowed not only on vested legacies, and legacies defeasible on a future contingency, but also upon legacies in which the legatee has no interest in praesenti, but which are purely In Mole v. Mole, 1 Dick. 310, the legacy was contingent. not only contingent upon the legatee's attaining the age of twenty-one, but the interest was ordered to accumulate, and the legacy was given over upon the defendant's dying before twenty-one. It has been observed that this is as strong a case as could well arise for the application of the rule, and it is relied on by complainant's counsel as authority for the position, that the court will make provision for the infant out of the estate against the expressed intention of the tes-The master of the rolls, in deciding the case, gives no reason for his decision which will justify the inference He makes no allusion whatever to the direcdrawn from it. tion for accumulation, nor to the fact that the decision is against the intent of the testator, but supports the decision solely by the citation of authorities to show that interest will be allowed when the legacy is contingent. The decision may, perhaps, be sustained on the ground that the presump-

tion arising from the obligation of the testator to support his infant child, is so strong as not to be overcome by the direction for accumulation, and that the order for accumulation was in fact made subject to that intent. If the case was meant to decide that maintenance will be allowed to an infant child out of the estate of a testator, against his clearly expressed intent, it is certainly in conflict with the great weight of authority.

Courts make the allowance of interest to the infant, either on the ground of carrying out the intention of the testator, or of dealing with the estate of the infant for its benefit. They do not attempt to violate the will of a testator, by disposing of his property contrary to his clearly declared intention, or by appropriating property bequeathed to A, for the support of B, though he be a child of the testator, an infant and destitute. If the testator had seen fit to leave both his infant daughters totally unprovided for, this court would have had no power to alter, however much it might regret, such disposition.

Nor can the court presume, when the testator has given to In is daughter an annuity for life, commencing on her attaining the age of fifteen years, that he intended that the annuity I hould commence upon his death. The more natural and assonable presumption would seem to be, where provision has been made by the testator for the mother of the child, that his intent and expectation was that the child would be aintained by the mother until the time designated for the mmencement of the annuity. The executor is not authorized anticipate the annuity to Virginia, nor to pay anything our tof the estate of the testator for her maintenance.

By his will, the testator gives the residue of his estate, real and personal, to his two sons, John Watts and Archibald Kennedy, to be equally divided between them. If either die before coming of age, the residuary estate is given to the survivor. If both die before coming of age, the entire residue is given to the testator's eldest male grandchild then living, on condition that he takes the name of Kearney. The

terms of the devise are clear, and vest an inmediate estate in the sons of the testator, liable to be defeated upon a future contingency.

There are expressions in the will which indicate a different purpose, and which, it is insisted, vest in the executor an estate in fee to be held by him in trust for the purposes specified in the will. Thus the executor is directed, as soon as convenient after the testator's death, to have the residuary estate allotted and set off in separate portions, and to hold the same severally in trust until the coming of age of each of the sons, and as each son comes of age, to execute and deliver to him a sufficient fee simple deed therefor, which it is clear the executor cannot do, unless he be himself seized in fee. The real design of the testator was, that the residuary estate should vest in his surviving son in possession and enjoyment, upon his attaining the age of twenty-one years. He probably believed that in order to effect that purpose, a deed from the executor was necessary, inasmuch as the estate, until that period, was to remain in the hands and under the control of the executor, who was invested with all such powers as might be necessary for the good management of the estate and the fulfillment of the testator's intentions. The surviving residuary devisee undoubtedly takes the estate subject to all the provisions of the will. He takes the residue, only after the legacies to the wife and daughters of the testator have been provided for. And the power of the executor to control the estate, so far as may be necessary for those purposes, is unquestioned. The legal title, nevertheless, is by the terms of the will, in the residuary devisee, not in the executor.

By the codicil, this legal estate of the residuary devisee in a part of the land, is made subject to a life interest of the wife. The language of the devise is as follows: "It is my will that my wife, Agnes, shall have the right to occupy and possess my estate called Bellegrove, in New Jersey, as well as all my furniture, household goods, silver, books, paintings, statuary, and other works in the fine arts, there or elsewhere, to hold to her during her natural life and widowhood." The

interest of the widow, both in the real and personal estate, continues so long only as she remains unmarried. It is tantamount to a devise for life, provided she remains unmarried; and if she marry, during her widowhood only. The interest of the wife is not a mere easement, consisting of the right of living in the house, and occupying the personal property there, but it is an estate of freehold, with all its rights and The gift is of the right to possess the property incidents. during her life. The possession of the estate necessarily involves its use and enjoyment, the right of receiving the rents, with all the privileges incident to a tenancy for life. of the rents is a devise of the land. Kerry v. Derrick, Cro. Jac. 104; Stewart v. Garnett, 3 Simons 398; Beekman v. Hudson, 20 Wend, 53; Craig v. Craig, 3 Barb. Ch. R. 76; 4 Kent's Com. 536.

The testator might undoubtedly have restricted the widow to the mere privilege of occupying, or residing in the house, and of using the personal property there, and not elsewhere. Such may have been his intention, but certainly no such restrictive words are used, nor is there anything in the will from which such intention can be legitimately inferred. There is no restriction whatever, express or implied, upon the use of the furniture. It is a gift of the right to possess the personal property for life or during widowhood, and necessarily involves the right of using it there, or elsewhere, at her pleasure. Marshall v. Blew, 2 Atkyns 217. worthy of remark, that the right conferred is not the right to reside in the mansion-house, but to occupy and possess the estate called Bellegrove. In the next clause of the codicil, the testator bequeathes to his wife an annuity of \$1000 during her life, in addition to what he had previously bequeathed to her, his object being (in the language of the will) "to enable her to reside in the place where our cherished son, Archibald Kennedy, died, and meet its expenses." whether she reside there or not, she shall receive the additional yearly sum of \$1000. The annuity was given to enable her to reside in the house, but it was left optional with her to

reside there or not. The gift of the land and chattels, as has been said, was much broader than a mere right of residence. It is a gift of the right to possess the estate and chattels, and to hold to her during her life and widowhood. No restriction is imposed in regard to her residence. None will be implied. It can be imposed only by the use of clear and unequivocal terms. Courts lean strongly against such restriction, in favor of the widow's right.

In Holme v. Harrison, 2 Wharten 283, the words of the will were, "my wife to have a house to live in and garden." It was held that she took an estate for life.

In Musthoff v. Dracourt, 3 Watts 240, the testator, after reserving two rooms for the use of W. during life, used this language: "I desire that the widow may have the choice of those two rooms, which shall the best suit her, because I desire that the said W. may be sure of a shelter during the time she may have to live." It was held that W. took an estate for life, and not a mere easement in the property.

Though not apparent upon the pleadings, it was admitted upon the argument, that the estate called Bellegrove, consists of one hundred acres of land, more or less. That there are upon it several tenements besides the mansion-house and its out-houses and dependencies, which the testator, during his life, was in the habit of leasing to tenants. Assuming this as an admitted fact, it seems to render the construction of the devise free from all doubt. The devisee clearly cannot occupy several tenements by personally residing in them. She cannot have the benefit of the devise, nor possess the Bellegrove estate in any other way than by taking an estate for life, which she may occupy either by her tenants, or in person.

The widow takes the Bellegrove estate, with all the incidents of a tenancy for life. She may not commit actual or permissive waste. To that extent only she is bound to repair. If the trustee deem that the interest of his cestui que trust, the tenant in remainder, require other repairs to the estate

before he comes of age, to that extent he will be authorized to repair.

The tenant for life and remainderman, each pay insurance for their respective interests. The estate of the infant can in no wise be benefited by insuring the life estate of the widow.

The expenses of removing the goods from Paris to Bellegrove, having been ordered by the testator in his life time, is clearly a debt of the estate, and must be paid by the executor.

Annuities secured by the bond of the testator or otherwise, and for which his estate is liable, must be paid by his executor. But an annuity for which there is no consideration, save natural love and affection, and which the testator was under no legal obligation to pay, creates no charge upon the estate. The fact that it was paid by the testator for a long course of years, and that he gave written instructions to his agent for its punctual payment while in life, creates no legal or equitable obligation to continue it after his death. The trustee has no authority to continue the payment of such annuity.

ELIZA ANN FREY vs. GARRET I. DEMAREST and MARGARET MAHER, administrators of Henry Frey, deceased.

- 1. The rule is that if an executor, administrator, or trustee, negligently suffer the trust moneys in his hands to lie idle, or mingle them with his own funds, or employ them in his business, he is chargeable with interest.
- 2. It is the duty of an administrator to invest the funds of an infant in his hands, within a reasonable time after the settlement of his accounts, where there is no probability that he will be called on for early payment.
- 3. An administrator is not entitled to a diminution in the legal rate of interest upon funds retained in his hands uninvested, on the ground that it would have been difficult to invest in his neighborhood small sums, except at less than the legal rate.
- 4. Administrator allowed six months from settlement of account for making investment, and charged with interest from that time to date of decree.

5. An administrator is entitled to no commissions upon funds remaining in his hands after settlement of his account, where he has neglected to invest them, or has converted them to his own use.

6. Where interest is given against a trustee, as a remedy for a breach of trust, costs follow as of course.

Mr. N. C. Slaight, for complainant.

Mr. C. H. Voorhis, for defendants.

THE CHANCELLOR. On the 24th of September, 1840, Garret I. Demarest, as one of the administrators of Henry Frey, deceased, settled his separate account in the Orphans Court of the county of Bergen, showing a balance in his hands of \$280.37½, to be distributed according to law. The balance consisted of the residue of the proceeds of the sale of of the intestate's real estate, after the payment of debts. The complainant is the only child and heir-at-law of the intestate, and is admitted to be entitled to the fund. The only question is to what amount of interest she is entitled.

The defendant admits that he has held the fund from the date of the settlement, and that since July, 1857, it has been mingled with his own individual funds. The rule is, that if an executor, administrator, or trustee, negligently suffer the trust moneys in his hands to lie idle, or mingle them with his own funds, or employ them in his business, he is chargeable with interest. 2 Story's Eq. Jur., § 1277; 2 Kent's Com. 231; Hill on Trustees, 374, and note 1.

Various reasons are urged why the defendant should not be charged with interest. It is said that the administrator kept the money on hand unemployed, under the apprehension that it might be called for at a time when the money was not in hand. An administrator may certainly, after the settlement of his accounts, retain the shares of those entitled to distribution in his hand for a reasonable time, where there is a probability that he will be called on for early payment. But the indulgence will be jealously guarded and restricted within reasonable limits. In the present case it can afford

no justification of the course of the administrator. date of the settlement in September, 1840, the complainant was an infant, not two years old. The mother, who was coadministratrix of the estate of her husband with Demarest, desired to have the money. She was at this time resident in the city of New York, dependent for her subsistence and She was informed that of her child upon her daily labor. that she could have the money, if she would take out letters of guardianship in New Jersey, but that freehold security was required. This she was unable to do. This interview seems to have taken place soon after the settlement. administrator subsequently heard that she was married, but was unable to find her residence, and afterwards heard nothing of either mother or daughter, until the complainant was of age. It was clearly the duty of the administrator, under such circumstances, to have invested the fund as soon as a reasonable time for taking out the letters of guardianship had elapted. The rule of equity as well as the statute (Nix. Dig. 578, § 14,) requires that the money in the hands of administrators should be invested, and protects them from all inconvenience that might result from the money being subsequently called for. The same ground of justification was offered and overruled in King v. Berry's Ex'rs, 2 Green's Ch. R. 261. Chancellor Vroom said: "I am afraid to set such a precedent; one which will cover all amounts and be a strong temptation to concealment and speculation and frauds, on the part of executors and trustees." The executor in that case was discharged from the payment of part of the interest claimed, on the ground that the testator had requested him to keep the money uninvested, and because he was advised by his counsel, that it was proper for him to do so. No such justification is offered here.

The rate of interest cannot be diminished upon the ground that, during a portion of the period, it would have been difficult to invest, in the neighborhood of the administrator, small sums at a rate exceeding five per cent. The practice of varying the rate of interest upon equitable principles, though Vol. II.

adopted by the Court of Chancery in England, has not been adopted in this state.

It is worthy of attention, moreover, if, during a portion of the time, it would have been difficult to obtain over five per cent., during another and perhaps larger portion of the time seven per cent. has been an authorized rate of interest in the county, and may have been readily obtained. The true protection for the defendant was to have obtained the direction of the Orphans Court in making the investment.

In Schieffelin v. Stewart, 1 Johns. Ch. R. 620, Chancellor Kent held that, if an administrator or trustee convert the moneys to his own use, or employ them in his business or trade, he is chargeable with compound interest. There are many other cases in which the same rule has been adopted, and it seems essential in many instances, to guard the rights of the infant, and to maintain the well established principle of equity, that a trustee shall never be permitted to make a profit out of the estate of his cestui que trust. But the circumstances, under which it is equitable to apply the rule, are not well defined, and in the present case, it might operate unfairly against the administrator. He was not engaged in a business in which the annual accumulations of interest could be used to advantage, and the annual interest consisted of sums so small as not to be susceptible of ready investment.

In Barney v. Saunders, 16 How. 542, Mr. Justice Grier states the rule thus: "On the subject of compounding interest on trustees, there is not, and indeed could not well be, any uniform rule which could justly apply in all cases. When a trust to invest has been grossly and wilfully neglected, where the funds have been used by the trustees in their own business, or profits made of which they give no account, interest is compounded as a punishment, or as a measure of damages for undisclosed profits, and in place of them. For mere neglect to invest, simple interest only is given. Six months rests have been made only where the amounts received were large, and such as could be easily, and at all times invested."

Six months from the settlement of the account will be allowed for making the investment; and the administrator harged with simple interest upon the fund in his hands, rom the 1st of April, 1841, until the date of the decree. There is no necessity for a reference to a master; a simple omputation of interest will fix the amount.

The administrator was allowed commissions on the settlement of the estate. He is entitled to no commissions where he has neglected to invest funds remaining in his hands, or as converted them to his own use. Warbass v. Armstrong, Stockt. 263.

The decree will be made with costs. Where interest is given gainst a trustee, as a remedy for a breach of trust, costs ollow as of course. Warbass v. Armstrong, 2 Stockt. 266; Scers v. Hind, 1 Vesey, 294; Piety v. Stace, 4 Vesey 620.

JOHN H. HINCHMAN and others vs. THE PATERSON HORSE RAILROAD COMPANY.

- 1. A public nuisance must be occasioned by acts done in violation of law. A work which is authorized by law cannot be a nuisance.
- 2. Whether the construction of a railroad in the street of a city, would operate beneficially or injuriously to the public right of way; whether it would prove a public benefit or a public nuisance, are questions to be determined by the legislature and by the city council. If the road prove an obstruction to the street, and a public inconvenience and injury, it is not punishable as a nuisance, if constructed as prescribed by the charter.
- 3. In cases of unquestioned public nuisance, a court of equity will not interfere by injunction, except in cases of special and serious injury to the complainant, distinct from that suffered by the public at large.
- 4. It is the settled law of this state, that a railroad company authorized to acquire lands for the use of their road by condemnation, and required to make payment or tender of compensation to the owner before occupying the land, cannot construct their road across or upon a highway, without making compensation to the owner of the soil occupied by the highway.
- 5. The building and operation of a horse railroad in the streets of a ci y, under proper restrictions and limitations by authority of the legislature

and of the city council, is a legitimate use of the highway, and an exercise of the public right of travel, and not a taking of private property for I-ublic use within the provision of the constitution.

- 6. Where the complainant's right is doubtful, and no irreparable injury will result, it is not a proper case for an injunction.
- 7. The established inference of law is, that a conveyance of land bounded on a public highway carries with it the fee to the centre of the road, as Part and parcel of the grant; and the grantee has the exclusive right to the soil subject to the right of way.
- 8. A bill filed by the owners of several and distinct lots of land, having no common interest, to enjoin a nuisance common to all the land owners, but each complainant seeking relief for special injury to his own property.

is demurrable for misjoinder of parties.

9. As a general rule, objection on the ground of misjoinder should be made by demurrer.

The complainants are, respectively, the owners of lots butting upon Congress and Market streets, in the city of Paterson, and claim title to the middle of the street. The defendants are about to construct a horse railroad through those streets, under the authority of their act of incorporation. The complainants ask to enjoin the construction of the road.

- 1. Because the construction and use of the road will prove a permanent obstruction to the ordinary use of the street; a public nuisance, and a consequent injury to the value of the property.
- 2. Because the property of the complainants is taken for public use without just compensation.

Mr. Woodruff and Mr. Gilchrist, for complainants.

Mr. A. S. Pennington and Mr. A. O. Zabriskie, for defendants.

Cases cited by complainants' counsel. 2 Story's Eq. Jur., § 923-9; 2 Mylne & C. 129-30-33; 14 N. Y. R. 526; 6 Johns. Ch. R. 439; 8 Sim. 193; Ibid. 272; 38 Barb. 283; 9 N. Y. R. 273; 3 Atk. 21; 6 Paige 83; 16 N. Y. R. 97, 111; 1 Bald. 226; 15 Wisconsin 101; 3 Law Register 378; 2

Beas. 314; 3 Kent's Com. 432-3-4; 1 Conn. 103; 2 Strange 1004; 1 Burrow 133; 6 East. 154; 2 Mass. 127; 6 Mass. 454; 2 Strange 1238; 1 Wilson 107; 23 N. Y. R. 63-5; 3 Paige 45; 24 N. Y. R. 655; 25 N. Y. R. 527; 4 Zab 527; Constitution, Article IV, Sec. VII, § 9; Angel on Highways, § 314; 4 Zab. 592; 22 Conn. 85; 2 Zab. 293, 304; Angel on Highways, § 224; 2 Zab. 368; 4 Cush. 71; Pierce on Railways 513-14; 1 Eng. Railway Cas. 154, 135; Redfield on Railways 127; 2 Gray 574; 7 Ellis & Black. 660; 16 Q. B. 923; 9 Barn. & Cress. 884, 5 Hill 170-5; Broom's Leg. Max. 152-5; 3 Sumner 197; 14 Adol. & Ellis (N. S.) 134-5; 2 Green's R. 254; 3 Hurlst. & Nor. 743-9; 1 Barn. & Ad. 441; 4 Zab. 81; Ibid. 495-6. Upon the question of joinder of parties. 1 Daniell's Ch.

Prac., p. 240, ch. 5; see also note 2, to same page; Ibid. 284-6-7-8; 4 Paige 510; Story's Eq. Pl., note 2 to § 544.

Cases cited by defendants' counsel. 2 Stockt. 358; Washb. on Easements, p. 138, § 18; 3 Dutcher 80; 6 Wharton 25, 45; 14 N. Y. R. 530; 2 Beas. 314; 34 Barb. 519; 23 Law Reporter 619; 27 Penn. 354; 8 Amer. Law Reg. 678; 34 Barb. 494; 35 Barb. 364; 37 Barb. 357; 39 Barb. 494.

THE CHANCELLOR. A public nuisance must be ocaasioned by acts done in violation of law. A work which is authorized by law cannot be a nuisance. Rex v. Pease, 4 Barn. & Ad. 30; Bordentown and S. Amboy Turnpike Co. v. Camden and Amboy R. R. Co., 2 Harr. 314; Davis v. The Mayor of New York, 14 N. Y. R. 506.

Whether the construction of a railroad in the street of a city would operate beneficially or injuriously to the public right of way; whether it would prove a public benefit or a Public nuisance, are questions to be determined by the legislature and by the city council. If they err in judgment, and the work prove an obstruction to the street, and a public inconvenience and injury, it is not punishable as a nuisance, if constructed as prescribed by the charter.

The injury which the owners of lots upon the street, suffer from obstructions in the street and impediments to traveling, are common to all the public. In cases of unquestioned public nuisance, a court of equity will not interfere by injunction, except in cases of special and serious injury to the complainant, distinct from that suffered by the public at large. Corning v. Lowerre, 6 Johns. Ch. R. 439; Bigelow v. Hartford Bridge Co., 14 Conn. 565; Allen v. Board of Chosen Freeholders, 2 Beas. 68; Zabriskie v. Jersey City & B. Railroad Co., Ibid. 314.

The real question in the cause is, whether the charter of the defendants, authorizing them to lay a railroad through the streets of the city over the land of the complainants, is a violation of that provision of the constitution which prohibits the taking of private property for public use without just compensation.

I take it to be the settled law of this state, that a railroad company authorized to acquire lands for the use of their road by condemnation, and required to make payment or tender of compensation to the owners before occupying the land, cannot construct their road across or upon a highway, without making compensation to the owner of the soil occupied by the Lighway. Starr v. Cam. & Atl. R. Co., 4 Zab. 592; The Central R. Co. v. Hetfield, 5 Dutcher 206.

The principle is fully sustained by the cases of The Trustees of the Presbyterian Society v. The Auburn & Rochester R. Co., 3 Hill 567; Williams v. The N. Y. Central R. Co., 16 N. Y. R. 97; Mahon v. The N. Y. Central R. Co., 42 N. Y. R. 658; Wager v. Troy Union R. Co., 25 N. Y. R. 526.

It would seem to follow as a necessary consequence, that the owner of the soil under the highway cannot be deprived of his property, or be prejudiced in any right therein, without compensation, even by express authority of the legislature, without a violation of the provision of the constitution, which declares that private property shall not be taken by public use without just compensation. It was so held

by Mr. Justice Haines, in the case of Starr v. Camden & Atlantic R. R. Co., already referred to. He said: "The premises in question, (viz. the land occupied by the highway) being private property, could not, either by the constitution or by the charter of the company, be taken, without compensation." The opinion is fully sustained by the cases in New York already cited. In the case of The Trustees of the Presbyterian Society v. The Auburn and Rochester R. R. Co., 3 Hill 569, Chief Justice Nelson said: "It is quite clear that the legislature had no power to authorize the company to enter upon and appropriate the land in question for purposes other than those to which it had been originally dedicated, in pursuance of the highway act, without first providing a just compensation." And in Williams v. The New York Central R. R. Co., 16 N. Y. R. 111, Judge Selden, delivering the opinion of the court, said: "The legislative provisions on the subject were probably intended to confer the right, so far only as the public easement is concerned, leaving the companies to deal with the private rights of individuals in the ordinary mode. however, more was intended, the provisions are clearly in conflict with the constitution, and cannot be sustained."

The principle as applied to ordinary railroad companies, which are authorized to excavate the soil, to raise embankments, to construct tunnels, and to use locomotive power running at high rates of speed, seems clear of difficulty. "The two uses," viz. "that of railroad and ordinary highway, are almost, if not wholly, inconsistent with each other, so that taking the highway for a railroad will nearly supersede the former use to which it had been legally appropriated." Inhabitants of Springfield v. Connecticut River R. R. Co., 4 Cush. 63. 'This is especially true when the land taken is applied exclusively to the use of the railroad, as by tunneling under the highway for the railroad track.

But there is more difficulty in the application of the principle, where a railroad track is permitted by the municipal authorities to be laid upon the surface of the streets, and to

he used as a part of the highway, and in connection with it. as in case of street railroads. They are ordinarily, as in this case, required to be laid level with the surface of the street, in conformity with existing grades. No excavations or embankments to affect the land are authorized or per-The use of the road is nearly identical with that of the ordinary highway. The motive power is the same. The noise and jarring of the street by the cars is not greater, and ordinarily less, than that produced by omnibuses and other vehicles in ordinary use. Admit that the nature of the use, as respects the traveling public, is somewhat variant, how does it prejudice the land-holder? Is his property Are his rights as a land-holder affected? interfere with the use of his property any more than an ordinary highway?

Nothing is claimed in support of this view of the case, on the ground that city railroads are a great public convenience and benefit. If they are so, the public can afford to That is certainly no reason why individual pay for it. property should be taken for public use. But admit, as the counsel of the complainants claim, that a railroad constructed and managed as street railroads frequently are, is a serious public inconvenience, an obstruction to travel, and an injury to the interests of the city; does that affect the rights of the land-holder any more than if the streets are suffered to become obstructed from any other cause, owing to the neglect or incapacity of the municipal corporation? The question at last recurs, what is taken from the landholder by a change in the use of the street, for which he is entitled to compensation? Neither his title to the fee, nor his right to the use or enjoyment of the land, is interfered The railroad company acquire no estate or interest in the land itself, but the mere right to the use of the highway or public easement. This view was adopted by Chancellor Williamson, in the case of The Morris & Essex Railroad Company v. The City of Newark, 2 Stockt. 358, and is sustained by many of the reported cases. Williams v. The

N. Y. Central R. R. Co., 18 Barb. 222; Philadelphia & Trenton Railroad Co., 6 Wharton 25; Commonwealth v. The Erie & North E. R. R. Co., 27 Penn 354; Elliott v. Fair Haven R. R., 23 Law Reporter 619; People v. Kerr, 37 Barb. 357; Brooklyn Central & Jamacia R. R. Co. v. Brooklyn City R. R. Co., 33 Barb. 420; Brooklyn City & N. R. R. Co. v. Coney Island & B. R. Co., 35 Barb. 364.

After much conflict of opinion, a different rule seems to have been settled in the courts of the state of New York. In the recent cases in that state, it is held, not only that the laying of a railroad upon a highway is a taking of private property, and a burden upon it beyond the servitude of the easement of the highway, but that there is no distinction, so far as the constitutional question is concerned, between a horse railroad in the streets of the city, and a railroad with broader powers operating by steam. Wager v. Troy Union R. R. Co., 25 Barb. 533; Craig v. Rochester City & R. R. Co., 39 Barb. 494.

I am, nevertheless, of opinion that the building and operation of a horse railroad in the streets of a city, under the restrictions and limitations contained in the charter of the defendants, by authority of the legislature and of the city council, is a legitimate use of the highway, and an exercise of the public right of travel, and not a taking of private property for public use, within the provision of the constitution. If it be admitted that this is a matter of doubt, it is, nevertheless, in accordance with a previous decision of this court, which, so far as I am aware, has not been questioned by any judicial tribunal of the state. It is of great importance that the law, where such large interests are at stake, should not be unsettled by conflicting decisions in the same tribunal.

Where the complainants' right is doubtful, and no irreparable injury will be inflicted by the construction of the road, it is not a proper case for an injunction. If the complainants' view of the case be correct, they have adequate

redress at law for all damages that may be sustained; or, their rights being established, they may invoke the power of this court to restrain the use of the road.

The presumption of law is, that the owners of the land on each side of the street, own to the middle of the street, and have the exclusive right to the soil, subject to the right of way. It is objected by the defendants' answer, that the complainants' titles do not extend to the middle of the street, because the lots as described, are bounded by the sides of the streets. But the established inference of law is, that a conveyance of land bounded on a public highway, carries with it the fee to the centre of the road, as part and parcel of the grant. 3 Kent's Com. 432-3; Cooke v. Green, 11 Price 736; Champlin v. Pendleton, 13 Conn. 26; Adams v. Saratoga & Wash. R. R. Co., 11 Barb. 414; Buck v. Squiers, 22 Vt. 484; Redfield on Railways 159, note and cases cited; Bissell v. The N. Y. Central R. R. Co., 23 N. Y. R. 61.

The bill is objectionable, on the ground of a misjoinder of parties. The complainants are owners of several and distinct lots, having no common interest, but seeking to enforce several and distinct claims. They seek to enforce no common right, as in cases of right of common, nor to obtain relief against a common wrong, as in cases of fraud, where all the creditors are equally affected. The bill seems to have been framed, under the impression that the nuisance was a grievance common to all the land-owners, and therefore, that all might properly be joined. But each complainant seeks relief for special injury to his own property by the construction of the railroad. On this ground, the bill is clearly demurrable. Story's Eq. Pl., § 279, § 544.

Several occupiers of houses in town, cannot sue as coplaintiffs to restrain the erection of a steam engine, which would be a nuisance to each of them, *Hudson* v. *Maddison*, 12 Sim. 416; and on the ground of misjoinder, the injunction issued in this case was dissolved, as it was also by Lord Eldon, in *Jones* v. *Del Rio*, 1 Turn. § Russ. 297.

Hogencamp v. Paterson Horse Railroad Co.

As a general rule, the objection on the ground of misjoinder should be made by demurrer. But this is a mere injunction bill, and if the injunction should be granted, a demurrer would be fatal. No final decree could be pronounced in favor of the complainants, and nothing could be eventually gained in the present shape of the bill, by sustaining the present application.

If this were the only objection, it would not be suffered to stand in the way of the order for an injunction. The defendants would be put to their demurrer, and an opportunity permitted to the complainants, to present their claim in a form to avoid the technical difficulty. The decision is made solely upon the merits of the bill. It is desirable that the leading question in the cause should be disposed of, and if possible, promptly settled, irrespective of all technical or collateral issues.

The motion for an injunction is denied, and the rule to show cause discharged with costs.

JOHN HOGENCAMP and wife vs. THE PATERSON HORSE RAILROAD COMPANY.

- 1. Upon a bill for injunction, an allegation that the location of a street railroad will inconvenience the complainant's business and diminish the value of his property, is material and significant, only where the road is constructed without authority, and the evil complained of is a public nuisance, as showing that the complainant has sustained special injury.
 - 2. But where the laying of the track and the use of the road are authorized by the municipal authorities, its location rests in the discretion of the corporation, or of those having the control and regulation of the streets. It cannot affect the question of right.

Mr. A. B. Woodruff, for complainants.

Hogencamp v. Paterson Horse Railroad Co.

Mr. A. S. Pennington, for defendants.

THE CHANCELLOR. The case made by the bill in this cause, is substantially the same with that presented in Hinchman against the same defendants. The technical objection on the ground of misjoinder is avoided.

The bill alleges that the complainants' premises are occupied for business purposes, part as a manufactory and store, and part as an express and freight office; and that, among other injuries to the premises that will be occasioned by the construction of the railroad, the space between the track and the curb-stone will be so limited as not to allow sufficient space for ordinary freight and express wagons to stand lengthwise across the street, when loading and unloading, as they have been accustomed to do, and the delivery of freight and express matter be thereby rendered inconvenient, and the value of the premises diminished.

This charge is material and significant, only where the road is constructed without authority, and the evil complained of is a public nuisance, as showing that the complainant has sustained special injury. McFarland v. Orange and Newark Horse Car R. Co., 2 Beas. 17; Zabriskie v. Jersey City and Bergen R. Co., Ibid. 314.

But where the laying of the track and the use of the road are authorized by the municipal authorities, its location rests in the discretion of the corporation, or of those having the control and regulation of the streets. It cannot affect the question of right.

I find nothing in the bill to distinguish it in substance from the Hinchman case, or from the operation of the principle by which that case was determined.

The injunction is denied.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW JERSEY,

MAY TERM, 1864.

SAMUEL SNOVER vs. DELILAH SNOVER.

Petition to be relieved from contributing to the maintenance of an infant child, on the ground of the father's pecuniary inability to pay the allowance decreed by the court, and that the child should live with the father and contribute to his support, denied; his pecuniary inability not being satisfactorily shown, and the character of his house being such as to render it improper that she should live there.

Mr. B. Williamson, for petitioner.

Mr. Sherrerd, for defendant, contra.

THE CHANCELLOR. When this case was before the court at February Term, 1861, (2 Beasley 261), the petitioner asked to be relieved from contributing to the maintenance of his child, upon a variety of grounds, most of which were entirely unsupported by evidence. It was further urged that the physical infirmities and advanced age of the petitioner disqualified him from active labor, that he was otherwise not of pecuniary ability to support himself and his Vol. II.

Snover v. Snover.

daughter, and that in justice to the petitioner as well as to his other children, she should either reside with the father and contribute to his support, or that the father should be relieved from all contribution to her maintenance. An intimation was then made that the petitioner would be heard upon this ground, after the child had attained the age of eighteen years. The application is now renewed, and further testimony in its support has been taken. Upon a careful review of the whole evidence, I feel constrained to deny the application.

It is not satisfactorily shown that the petitioner is not of sufficient pecuniary ability to support himself and make this contribution to the maintenance of his child. The physical disabilities to which he is subject, all existed at the time of making the original order. The allowance for the child's support was probably graduated in some measure by a regard to the physical, as well as the pecuniary condition of the father. It is very small in amount, and obviously inadequate to the maintenance of the child.

The allegations of the answer in this case, as well as the circumstances under which the divorce was granted, show clearly that the father's house is not, and cannot be, a proper home for the daughter, whether the father is now living in lawful wedlock, or in illicit intercourse with another woman than the mother of the child.

None of the petitioner's numerous family of children by the wife who obtained the divorce, and who now resists this application, reside with the father, or make his house their home. They are settled in life, or are supporting themselves. The only proper home for the daughter is with her mother.

Nor is there any mode in which the court, independent of the security already given, can compel the petitioner, being a resident of another state, to maintain his child or contribute to her support, in case of his failure or neglect to do so. There is no propriety in imposing that burden entirely upon the mother, in case of the sickness of the child or her inability to support herself.

It is a circumstance entitled to consideration, that the great increase of the necessary cost of living has rendered the allowance to the mother intrinsically of less value than it was at the date of the order for alimony. If this petition should be granted, it will naturally be followed by a counter application from the mother for an increase of allowance on her own account. It is right in every aspect of the case, that the order should remain undisturbed.

The order restraining proceedings at law for the recovery of the amount heretofore decreed to be paid to the respondent, must be set aside. The arrears should be paid, with interest from the time the instalments severally became due.

The petition is denied, without costs.

HENRY VANDERVEER vs. CHARLES P. HOLCOMB and wife and others.

- 1. Upon a bill filed by a mortgagee for foreclosure and sale of mortgaged premises, the mortgagor may by his answer set up usury against the claims of a mortgagee, who is made a co-defendant. He will not be driven to a cross-bill, and be thereby deprived of his defence.
- 2. Where a case is made out between defendants, by evidence arising from pleadings and proofs between plaintiffs and defendants, a court of equity is bound to make a decree between the defendants.
 - 3. If the defendant asks substantial relief, either as against the complainant or a co-defendant, or a discovery, a cross-bill may be necessary. But the court dispenses with the necessity of a cross-bill when the whole matter is before it, and the party is not thereby deprived of any of his substantial rights by a decree in the existing suit.
 - 4. Upon a bill for foreclosure and sale of mortgaged premises, all the subsequent encumbrancers are necessary parties, and to effectuate a complete decree, the existence, validity, order of priority, and amount due upon the several mortgages, must be settled and décided.
 - 5. It is no objection to permitting a mortgagor to set up usury against the claim of a mortgagee, made co-defendant, without filing a cross-bill, that it deprives such mortgagee of the benefit of his answer. If he were complainant seeking to enforce his mortgage, he could have no benefit of an answer to the defence of usury.

- 6. If the lender come into equity, seeking to enforce the contract, the court will give effect to the statute and declare the contract void. But if the borrower seek relief against the contract, the court will prescribe the terms of its interference.
- 7. If a discovery is necessary to aid a defendant in a defence at law, or otherwise, equity will not require him to answer under oath, and thus be a witness against himself in a matter which will subject him to a penalty or forfeiture, or to any loss in the nature of a forfeiture.
- 8. A mortgagee, who has dismissed a bill which he had exhibited in his own name for the foreclosure of his mortgage, and to which the mortgager had set up the defence of usury, and by collusion with another mortgagee has caused a new suit to be instituted, and himself made defendant, has no right to object that he is made a party unnecessarily, or brought into court against his will, and is therefore entitled to a decree for the amount due upon his mortgage. Such mortgagee is in truth the actor, seeking under color of the complainant's rights, to deprive the mortgager of the protection of the statute as against a usurious claim.

The bill of complaint in this cause is filed by the first mortgagee in order of priority, against the mortgagor and all subsequent encumbrancers, for the foreclosure and sale of the mortgaged premises.

The third mortgagee answers, admitting the prior and subsequent encumbrances, setting up his own mortgage as a valid subsisting encumbrance, and concluding with a prayer that a decree may be made for a sale of the mortgaged premises, and that he may be paid the principal and interest due on his mortgage.

The mortgagor answers, admitting the existence and validity of the complainant's mortgage, but alleging that the complainant procured the assignment thereof to be made to him by collusion with the third mortgagee, and exhibited his bill for the sole purpose of aiding the third mortgagee in recovering upon a void and usurious mortgage. The answer admits the making of the third mortgage, but alleges that the mortgage is usurious and void for the cause set out in the answer.

The answer also alleges that a bill was filed in this court, by the third mortgagee, on the second of June, 1863, for the foreclosure of his mortgage, that the defence of usury was

set up by the mortgagor, and that thereupon the complainant in that suit dismissed his own bill, and concerted a plan with the complainant in this suit, by which the third mortgagee might be enabled to recover upon his usurious mortgage, and the defendant be precluded from setting up the defence of usury. The mortgagor disclaims any intention or desire that a decree should be made in anywise affecting the bond or mortgage of the third mortgagee, except so far forth as a decree in this suit will necessarily affect the same. And he consents that a decree be made which, while it shall declare the bond and mortgage void or nugatory for the purposes of this suit, shall leave the same for all other purposes, unaffected by the decree.

To so much of this answer as alleges collusion between the complainant and the third mortgagee in the filing of the bill, the complainant excepted as scandalous and impertinent; and to so much as relates to the usurious character of the third mortgage, to the institution and abandonment of a previous suit for its recovery, and to the nature of the protection against that mortgage, which the defendant asks, the complainant excepted as impertinent. The master having made his report upon the exceptions to the answer, the case is now submitted upon exceptions to the report.

Mr. J. V. Voorhees, for complainants.

Mr. Richey, for defendants, Charles P. Holcomb and wife.

Mr. S. B. Ransom, for defendant, Henry Vanderveer.

THE CHANCELLOR. The material question involved is, whether, upon a bill filed by a mortgagee for foreclosure and sale of mortgaged premises, the mortgagor may by his answer set up usury against the claims of other mortgagees, who are made co-defendants, or whether he will be driven to cross-bill, and thereby deprived of his defence. A decree between co-defendants may be grounded on evidence between Plaintiffs and defendants. It is declared by Lord Redesdale

to be "a jurisdiction long settled and acted on, and the constant practice of a court of equity." Where a case is made out between defendants, by evidence arising from pleading= and proofs between plaintiffs and defendants, a court of equity is not only entitled to make a decree between the defendants , In the language of Lord Eldon, "the but is bound to do so. defendant chargeable has a right to insist that he shall no be liable to be made a defendant in another suit for anothe matter, that may be then decided between him and his codefendant. And the co-defendant may insist that he shall not be obliged to institute another suit for a matter that mass be then adjusted between the defendants. And if a cour # of equity refused so to decree, it would be good cause of appeal by either defen lant." Chamley v. Lord Duneany, Sch. & Lef. 710, 715; Conry v. Caulfield, 2 Ball. & Beat-255, 273; Elliott v. Pell, 1 Palge 263.

If the defendant asks substantial relief either as agains the complainant or a co-defendant, or a discovery, a crossill may be necessary. But the court dispenses with the necessity of a cross-bill, where the whole matter is before the court, and the party is not thereby deprived of any of his substantial rights by a decree in the existing suit. Ames v. N. J. Franklin to Co., 1 Bons. 66.

Upon a bill for forclosure and sale of mortgaged premises all the subsequent encumbrancers are necessary parties, and to effectuate a complete decree, the existence, validity, order of priority, and amount due upon the several mortgages, must be settled and decided. The rights of each mortgages defendant are as fully established as those of the complainant, and the decree is as conclusive against the mortgagor, both as to the validity and amount of the several mortgages, as though a separate bill had been filed, and decree made upon each. It is, to all intents and purposes, a forcelosure suit by each of the encumbrancers against the mortgagor. As against the complainant, the mortgagor may allege and prove that the mortgage is usurious. Why not, as against every

other encumbrancer who seeks to enforce his claim against the mortgaged premises?

It is urged that permitting the mortgager to set up usury without filing a cross-bill, deprives the defendant mortgagee of the benefit of his answer. But if he were complainant seeking to enforce his mortgage, he could have no benefit of an answer to the defence of usury. He must file a replication, and go before the master upon substantially the same pleadings and proofs that he will do as defendant.

The fact cannot be disguised, that the encumbrancers are

before the court seeking to enforce their claims. The mortgagor is here in the character of a defendant, resisting the enforcement of a claim which he insists is usurious and void. He asks the protection which the law gives to every defendant against whom a usurious claim is sought to be established. Courts of equity follow the law, in the construction of the statutes against usury. If the lender come into equity seeking to enforce the contract, the court will give effect to the statute, and declare the contract void. But if the borrower seeks relief against the contract, the court will prescribe the terms of its interference. It will not actively interfere for the relief of the borrower, unless he will pay what is justly The principle of the court is, that he who will have equity must do it. So if a discovery is necessary to aid him in a defence at law or otherwise, equity will not require the defendant to answer under oath, and thus be a witness against himself in a matter which will subject him to a Penalty or forfeiture, or to any loss in the nature of a forfeiture. 1 Story's Eq. Jur., § 301; 1 Fonb. Eq. 25, note h; Fanning v. Dunham, 5 Johns. Ch. R. 143; Livingston v. Harris, 3 Paige 533-4; Whitmore v. Francis, 8 Price Exch. 616. And it makes no difference as to the nature of the relief granted, that the remedy against the usurious contract is sought by cross-bill. Mason v. Gardiner, 4 Brc. Ch. R. 322, and note 2; Fulton Bank v. Beach, 1 Paige 433; Miller v. Ford, Saxton 364.

The principle of all the cases is, that if the defendant asks

the interposition of the extraordinary or equitable powers of the court to aid him in his defence against a usurious claim, he must consent to do equity before he can obtain that aid. But in this case the defendant does not ask the interposition of the extraordinary or equitable powers of the court. He seeks no discovery of the usury, nor does he ask that the contract should be surrendered or delivered up to be cancelled. All that he asks is, that it should not be enforced as a valid encumbrance upon the mortgaged premises.

The mortgagor is asking no favor. He is not in a position in which terms may be imposed upon him. The court is not at liberty to interpose or withhold the exercise of its powers at its discretion. The mortgagor relies upon his legal rights, and the court are bound to protect them. has the third mortgagee any right to object that he is made a party unnecessarily, or brought into court against his will, or for the mere purpose of having his mortgage redeemed. The answer alleges that he is in fact the actor. collusion with the complainant, he caused the suit to be instituted, having first dismissed a bill which he had exhibited in his own name for the foreclosure of his mortgage, and to which the mortgagor had set up usury as a defence. circumstances clearly take the case out of the operation of the decision in Hudnit v. Nash, 1 C. E. Green 550. show that so far from the third mortgagee being brought by other parties unnecessarily, or involuntarily, before the court, he is in truth the actor, seeking under the color of the complainant's rights, to deprive the mortgagor of the protection of the statute as against a usurious claim.

In this aspect of the case, I think the mortgagor was justified in setting up in his answer, those matters which the master has regarded as irrelevant. Viewed in reference to the claim of the complainant they clearly are so, but as against the claim of the third mortgagee, who is made a defendant by the complainant in order to the enforcement of his own rights, the allegations cannot be regarded as irrelevant or impertinent. They were obviously designed to remove the difficulties

Ward v. Cooke et al.

which were suggested by the Chief Justice to the defence of usury in *Hudnit* v. *Nash*. It is material to observe, that none of these allegations are made by way of defence to the complainant's mortgage. That is admitted, and no objection is made to a decree in his favor. They are designed solely as a defence to the claim of the defendant mortgagee, and the exceptions must be viewed in that light. The complainant in fact, if he is merely seeking the enforcement of his own claim, has no ground of exception to the answer.

I think all the exceptions taken to the defendant's answer should have been disallowed by the master.

The order will be made accordingly.

ISRAEL C. WARD vs. ROBERT S. COOKE and wife and others.

- 1. A mortgage given to secure future advances, duly registered, is good not only as against the mortgagor, but is entitled to priority over subsequent encumbrances, for all advances made prior to actual notice of the subsequent encumbrance.
- 2. If the first mortgagee have knowledge of the existence of a second mortgage upon the estate, he cannot give further credit upon his prior mortgage, provided it is entirely optional with him whether to make further advances or not.

Mr. Dodd, for the complainant, contended that the evidence showed, that for all genuine, substantial purposes for which an open mortgage is given, the mortgage of the complainant was an open mortgage; that it was designed to secure future advances.

A mortgage for future indebtedness is valid. Will it take Priority over a second mortgage?

The rule is that it will take priority for all advances prior actual notice.

Actual notice was not given till the fall of 1860. All indebtedness to the complainant was incurred prior to that time.

He cited 1 Hilliard on Mortgages Ch. 12, § 54; Griffin v. Oil Company, 3 Stockt. 49; Bell v. Fleming's Exr's, 1 Beas. 13; 11 Amer. Law Reg. 1.

Mr. McDonald, for defendant.

THE CHANCELLOR. The only controversy in this cause relates to the amount due upon the complainant's mortgage. The mortgage is given by Cooke and wife to the complainant, to secure the payment of a bond from Cooke to the complainant for \$900, dated on the 1st of July, 1856, and payable in one year, with interest at seven per cent. The mortgage bears even date with the bond. A second mortgage upon the premises was given by Cooke and wife to Peter S. Talmage, to secure the payment of \$1000, which remains unpaid.

The mortgagor, by his answer, alleges that there remains due on the mortgage of the complainant, but \$286.93, with interest from the 11th of January, 1858. He states the origin and history of the transaction to be as follows:

Cooke purchased the mortgaged premises of Aaron E. Ballard, in 1851, for \$1200. The purchase money was payable in four equal annual instalments of \$300 each, from and after the 15th of November, 1851, bearing interest from 1st April, 1852, and was secured upon the premises. these instalments were paid before the date of the complainant's mortgage, and at that date, 1st July, 1856, there remained due to Ballard \$300, with some arrears of interest. About that date, Cooke borrowed of the complainant \$500, and as well to secure the payment of that debt, as to indemnify the complainant against the claim of Ballard, which was an encumbrance on the premises, he gave his bond and mortgage for \$900, which are the bond and mortgage set out in the complainant's bill. Ballard's mortgage having been subsequently cancelled, there remained due on the complainant's mortgage but \$500. Of this sum, \$250 was paid by a note or notes of Cooke to the complainant, which

were paid at maturity, thus leaving \$250 of principal due upon the mortgage.

On or about the 8th of October, 1857, Cooke gave the complainant his promissory note at three months, for \$286.-93, for the balance due on the mortgage, including principal and interest, up to the time of the maturity of the note. This balance was ascertained by an accounting between Cooke and the complainant, and there was a distinct understanding between them, that the payment of the note would be a satisfaction of the mortgage. This note is admitted to be unpaid.

The complainant and the mortgagor are the only witnesses that have been examined. They agree that the sum of \$900 was not due to the complainant at the date of the mortgage, and that there was at that time a subsisting indebtedness of \$500. The complainant alleges that the mortgage was given to secure that indebtedness, and also as a security for future advances. The mortgagor, by his evidence, re-affirms the statement contained in the answer. They agree substantially as to the amount of the debt now due and claimed by the complainant. They differ only as to the fact whether the debt is secured by the mortgage. The real question at issue is, whether the mortgage was given to secure future advances and liabilities, or whether it was given for the specific purpose stated in the answer. As the character of both witnesses is unimpeached, and as they are equally confident as to the truth of their respective statements, recourse must be had to the admitted facts of the case, and to the written evidence, to determine where the truth lies. The parties speak of transactions which occurred nearly seven years before they were called upon to testify, and it is not surprising that one or both of them should have fallen into error as to the real facts of the

The version of the transaction given in the answer is, that the mortgage was in reality given to secure the payment of \$500, borrowed by Cooke of the complainant, and that it was

made for \$900, on the demand of the complainant, in order to secure him against loss or damage on account of the unpaid balance of the Ballard debt, which was a prior mortgage upon the premises. Now it is evident that this could not have been the true nature of the transaction. Increasing the amount of the mortgage to the complainant, could have afforded no indemnity against a previous encumbrance upon the same premises. If the mortgaged premises encumbered by the Ballard debt, was not a perfect security for \$500, it surely was no security for \$900. Nor was the \$500 rendered any more secure by increasing the amount of the mortgage to the complainant. The real nature of the transaction is clearly shown by the exhibits made by Cooke himself. The Ballard mortgage, as appears by endorsements upon it, was paid in full on the 28th of June, and was cancelled of record on the 30th of June, before the complainant's mortgage was given. The principal of the debt, \$300, was paid by Cooke's note for that amount, endorsed by the complainant, dated July 1st, payable six months after date, with interest. This note was probably post-dated and delivered to Ballard on the 28th of June, when he acknowledged the receipt of the mortgage debt. arrear of interest on the mortgage, about \$12, must have been paid at the same time by Cooke. At any rate, the principal and interest of the Ballard mortgage were satisfied in full before the complainant's mortgage was given. was obviously given therefore, not as an indemnity against the Ballard debt, but as security for advances which the complainant might thereafter be compelled to make, as endorser of the note for \$300, given by Cooke to Ballard. This accounts for an addition of \$300 to the prior indebtedness of \$500, making the mortgage \$800. But why should it have been made \$900? Cooke says, by way of indemnity; but indemnity against what? Not against the Ballard debt, Not against interest that might that was extinguished. accrue upon the \$300 note, for the mortgage bore interest as well as the note, and the same rate of interest. It could

have been given only, as the complainant alleges it was, as a security for future advances. All the circusmtances of the transaction are corroborative of this view of the case. Cooke, at the date of the mortgage, was not a borrower from the complainant. The \$500 indebtedness, for which the mortgage was given, was not loaned at that time. was, as Cooke admits, a subsisting indebtedness, previously incurred for advances made at different times. Ballard appears to have been pressing for the payment of his debt, which Cooke was unable to meet. The evidence of this fact is, that he gave, in payment of a mortgage debt, bearing but six per cent. interest, his note at six months, with the complainant's endorsement, bearing interest at seven per Cooke applied to the complainant to become his en-The complainant consented, upon Cooke's agreeing dorser. to give him a mortgage for past as well as future liabilities and advances. It was not, therefore, as the answer alleges, a mortgage given to secure a specific debt of \$500, and as mere indemnity against the Ballard mortgage, but an open mortgage, designed as a security for future, as well as past advances. If there were room for the possibility of a doubt upon this subject, it is dispelled by testimony furnished by the parties themselves. The advances claimed to have been made by the complainant upon the security of that mortgage, were made at various times from 1855 to 1860, in amounts varying from \$17 to over \$200. Many of them were made at a time when the borrower was deeply embarrassed, and his property heavily encumbered by judgments The circumstances leave no room to doubt and mortgages. the truth of the complainant's evidence, that he never would have made those advances, but upon the security of the mortgage. The defendant testified orally, that he did not understand the mortgage to be an open mortgage, or that the money was advanced upon its security. He was very emphatic in his testimony upon this point, and doubtless stated what he believed to be the truth. But he is confronted by his own written testimony. In a note addressed Vol. II.

by him to the complainant, he says: "Will it not be possible for you to help me to raise the amount of the note due to Dennis on Saturday? I cannot at present meet it, or even any part of it. You have an open mortgage on the Ballard place, which will amply pay it. I hope soon to effect some arrangement that will relieve me from my embarrassment." It is testified by Cooke, that the mortgage in question is the only mortgage ever held by the complainant upon the Baliard place. The note, of necessity, refers to the mortgage now in question, and is admitted to have been written by the defendant. His recognition of the genuineness of the note is very remarkable. In answer to the question, whether the note was written by him, the witness says: "If this letter was presented to me without any reference to its contents, and I was asked whose handwriting it was, I would say it was mine, but if it was read to me, I should say it was not mine. I can hardly believe it to be mine, and yet I would be sorry to say it was not my handwriting." would be gross injustice to the witness to suppose, that for the purpose of obtaining a loan from the complainant, he talsely represented the mortgage to be what he knew or believed it was not. The witness, with honest indignation, repudiates this idea. It is but justice to him to believe that he wrote, as well as testified, conscientiously. But it is apparent that he testified quite too confidently, laboring under a grave mistake, or in utter forgetfulness of the real character of the transaction. Considering the character of the witness, it furnishes a striking illustration of the imyokey and danger of permitting mortgages given for specific sums, without stating their real character, to stand as security for future advances.

There is another point upon which the allegations of the answer are erroneous, and the witness is mistaken in his testimony. It is alleged in the answer, and Cooke testifies, that he paid off the Ballard debt, leaving the complainant's mortgage as security only for \$500. That of this sum, he gave his note for \$250, and that on the 8th of October,

1857, he gave his note for \$286.93, in full of the balance of principal and interest due on the mortgage. The last note is admitted to be due and unpaid, but the former notes he alleges were taken up and paid by him, and produces the notes as evidence of the truth of his statement. no question that these notes were given, and were, as the witness alleges, taken up by himself. But how was it done? If his note was taken up by renewal, or with a substituted security, or funds furnished by the complainant, although his note was paid, the mortgage was not satisfied. security remained for the renewal, or the substituted security. The witness admits that he paid the note given for the Ballard debt, by the aid of the complainant. The history and connection of the several securities is not clearly traced, but it is clear that the indebtedness was not paid, as stated in All question upon this point is removed by the the answer. evidence of the parties. The complainant furnishes a list of securities for moneys, amounting with interest, to \$1063.32, which he alleges was furnished to Cooke upon the security of the mortgage, and which he claims to be paid out of it. With the exception of \$50, which he claimed as a credit on one of the notes, Cooke admits his indebtedness upon those securities. He also admits, that if the mortgage was an open one, the principal and interest due upon those securities, would be the amount covered by it. As between the mortgagor and mortgagee, this closes the controversy.

A mortgage given to secure future advances, duly registered, is good, not only as against the mortgagor, but is entitled to priority over subsequent encumbrances, for all advances made prior to notice of the subsequent encumbrance. Griffin v. New Jersey Oil Co., 3 Stockt. 49; Bell v. Fleming's Ex'rs, 1 Beasley 13; Robinson v. Urquhart, Ibid. 515.

And the notice must be an actual, not a constructive notice. This was regarded by the Chancellor, in Bell v. Fleming's Ex'rs, as not altogether a settled question. There is, undoubtedly, some conflict of authority upon the point. In

Warde Jooke et al

Tennsylvania and Chirott his been held, that the registry of the second mortgage is notice to the first mortgages, not 0 make forther advances upon his mortgage. Ten-Howan Herak, 2 Form 10 Former on v. t-despie. & Born St. Section 2 2008, 17 Jb., In ST1

Heres, 2 Free 1. Free error w. e-displace Brow St. Northway I seek 17 (18). In 171

In 181. The World of Market T. Danet Fill the Supreme Domination the United States had taken a marrigage given first tree always as was a security for all advances make, and taken a various and the receipt Market Market and the sevents Market Mark

It is not a property of the control of the service of the property of the service of the service

The pump of the property is not advised by the registry of the modifyed on Automorphism as not given before the execution was not given before the

It will be intered accombinate.



Reid v. Reid.

ELIZABETH A. REID vs. DANIEL D. REID.

- 1. To justify a decree for divorce on the ground of adultery, the evidence of the defendant's guilt must be clear and satisfactory. A full and explicit denial of the charge by the defendant, and his alleged particeps criminis, should be regarded as decisive in a case of doubt.
- 2. Testimony touching reputation, founded on opinions expressed post litem motam, is incompetent.
- 3. A stranger sent by a party to the neighborhood of a witness to learn his character, will not be permitted to testify as to the result of his inquiries.

Mr. A. C. McLean and Mr. Richey, for complainant.

Mr. Leupp, for defendant, cited Bray v. Bray, 2 Halst. Ch. R. 510; Clutch v. Clutch, Saxton 474.

THE CHANCELLOR, The complainant's bill charges that the adultery, which is the subject of complaint, was committed on different days in the months of August, September, and October, 1861. The evidence is confined exclusively to one transaction which occurred, according to the evidence, in the summer, or fall, of 1861. Two witnesses testify, that while they were riding through a wood, distant some miles from the defendant's residence, they saw a horse and carriage by the road side, and at the distance of from twenty-five to forty yards from the road upon which they were traveling, a man and woman engaged in illicit intercourse. The woman they recognized, and knew to be a female of disreputable character. One of the witnesses states distinctly that he did not then know the defendant, that he had never seen him before, that he was not certain that he had ever seen him since, till the day of his examination, eighteen months after-He is not certain that the defendant is the man he saw in the wood, but thinks he looks like him. The other witness was not examined till October, 1863, two years after

Reid v. Reid.

He testifies that the the transaction to which he deposes. defendant is the person whom he saw; that he knew him. But he admits that he had never seen him but once, and that was four or five years before the transaction. whole evidence of the defendant's identity, and consequently of his guilt, rests upon the uncorroborated testimony of this witness. It does not appear that the defendant and the witness had any previous acquaintance, that they had ever spoken to each other, or been in company together. witness testifies that he had seen the defendant once, four There is not a or five years previous to the transaction. fact or circumstance, relative to the character or conduct of the defendant, to give probability to the statement. suming the witness to be fair, and his testimony unimpeached, the identification of the defendant, and the consequent proof of his guilt, are not sufficiently clear to justify a decree against him.

The case in favor of the defendant is strengthened by the evidence in his behalf. The female with whom the criminal intercourse is charged to have taken place, testifies that she never knew, spoke to, or saw the defendant, till after the commencement of this suit. The defendant himself, by his evidence, corroborates this statement, and denies that he ever committed adultery. They both explicitly deny the truth of the charge, attempted to be established against the defendant by the complainant's witnesses. However insufficient this evidence might be to overturn or impair the effect of clear and satisfactory testimony of the defendant's guilt, it is nevertheless entitled to consideration, and should be regarded as decisive in a case of doubt.

An attempt is made to impeach the character of the complainant's witnesses for veracity, but no reliance is placed upon this part of the case. Much of the evidence as to the character of the witnesses, is founded on opinions expressed by others since their examination. A material portion of it is furnished by an agent of the defendant, who made inquiries in the neighborhood of the residence of the witnesses.

Executor of Letson v. Letson et al.

for the purpose of procuring evidence in this cause, and who details the opinions of others thus obtained. All this evidence is clearly incompetent. No rule is better settled, or founded on clearer principles, than that which excludes all testimony touching reputation founded on opinions expressed post litem motam. Not only should evidence as to the character of the witness be founded on reputation, previously existing, but a stranger sent by a party to the neighborhood of the witness to learn his character, will not be permitted to testify as to the result of his inquiries. 1 Greenl. Ev., § 461; Douglass v. Tousey, 2, Wend. 352. The bill is dismissed without costs.

JOHN S. LETSON, executor of Thomas Letson, deceased, vs. JOHNSON LETSON and others.

A bona fide purchaser of land devised, without notice, cannot be affected by any equity subsisting between the executor of the estate and the devisee.

Thomas Letson, the complainant's testator, by his will, bearing date on the 30th of November, 1839, devised to his son, Johnson Letson, certain real estate in the city of New Brunswick, and also bequeathed to him a share of the residue of his personal estate, and of the proceeds of the sale of certain real estate, directed by the testator to be sold by his executors.

The will also contained the following provision: "Inasmuch as I have mortgaged the farm on which I live, for the sum of one thousand dollars, for the benefit of my son, Johnson Letson, my will is, that the said Johnson Letson pay the interest of said thousand dollars from my decease, and pay also the said principal sum of one thousand dollars, when the same shall be demanded, or sooner if he shall choose so to do." The will further charges the interest and

Executor of Letson r. Letson et al.

share of the said Johnson Letson in the estate, with the re-payment of the said sum of one thousand dollars.

By a codicil to the will, bearing date on the 27th of May, 1848, the testator directed as follows: "I have loaned and advanced to my son, Johnson Letson, one thousand dollars, and have joined in a bond and mortgage to secure seventeen hundred dollars to James Conover, of New Brunswick. I expect and direct my said son, Johnson, to pay both said sums of money, in aid and release of my estate." The testator died on the 13th of May, 1851.

After the testator's death, the defendant, Johnson Letson, entered upon the lands devised to him, and on the 6th of December, 1856, conveyed the same, with covenants of warranty, to the minister, elders, and deacons of the Second Protestant Reformed Dutch Church, in the city of New Brunswick.

The complainant seeks to recover two sums of one thousand dollars, stated in the will and in the codicil, respectively, to have been advanced by the testator for the defendant, and to have the same declared a charge and encumbrance upon the land devised to the defendant, and by him conveyed to the church.

Mr. Leupp, for complainant.

Mr. Schenck, for defendant.

THE CHANCELLOR. The only issue made by the pleudings, and the sole ground of controversy between the parties is, whether the sum of one thousand dollars, specified in the will as having been advanced by the testator to the defendant, was, or was not, repaid to the testator in his lifetime. The defendant, by his answer, alleges that the money was repaid to the testator in the spring of 1845. I think this allegation of the answer is sustained by the evidence. It is satisfactorily proved, that after the date of the will, and at or about the time specified in the answer, a debt of

Executor of Letson v. Letson et al.

one thousand dollars was paid by the defendant to his father. It is not shown that at the time, there was any other debt due from the defendant to his father, than the one specified in the will. It appears, moreover, that for several years prior to the date of the alleged payment, the interest on the debt was paid by the defendant, although, as stated in the will, it was secured by a mortgage given by the father From the time of the alleged payment, the interest on the debt was paid, not by the defendant, but by his father, or by the complainant, either on his own behalf, or as the agent of his father. Whether the interest was in fact paid by the complainant on his own account, or as the agent of the testator, is immaterial for the purpose of this inquiry. It is conceded that it was not paid by the defendant. further in evidence, that subsequently to the date of the codicil, and shortly before his death, the testator, in a conversation with the defendant, spoke of his having paid one sum of one thousand dollars, and that there was still a debt of one thousand dollars due.

The money furnished by the testator to the defendant was not an ordinary loan, but was rather in the nature of an advancement. The defendant gave no voucher or security for its repayment. He was under no obligation to repay the principal, though at liberty to do so, and if not paid, it was to be deducted from his share of the testator's estate, and in the meantime the interest was to be paid by the defendant. Under these circumstances, the fact that no receipt was given on the repayment of the money to the testator, is entitled to far less weight than it would have been in the case of an ordinary indebtedness. The sum of one thousand dollars, specified in the will, having been paid to the testator in his lifetime, the complainant is entitled to recover only the sum of one thousand dollars mentioned in the codicil, or 80 much thereof as remains unsatisfied.

As against the church, the bill must be dismissed. The moneys directed in the codicil to be paid by the defendant, are not made a charge upon the real estate devised to him.

Ĺ

Hospiani et al. v. Trwnship of Delaware.

A form file purchaser of the land devised, without notice, wannot be affected by any equity subsisting between the executor of the estate and the devisee.

The letter will be made without mets to either party, a against the other.

ISSATHAR ECAPHAND and others on The Inhabitants of the Township of I belaware and others.

- 1. Equity will not interfere, where adequate relief can be had at law.
- 1. A point of equity will interfere by organization, to restrain the collection of a public tax assessed upon the property of individuals, only where the bull scattage some peculiar ground of equitable parasitation.

The complainants are residents and tax payers of the township of Delaware, in the county of Hunterdon, and have filed their bill in this cause, to restrain the defendants from collecting a tax imposed by an act of the legislature, entitled wan act to authorize the township of Pelaware, in the county of Hunterdon, to raise money by taxation to relieve the inhabitants of said township from the burden of a draft," approved 15th March, 1864.

The prayer of the bill is, that Pavid Jackson, collector, may be restrained from collecting or receiving any moneys assessed under said act, and from taking any proceedings under said act against the inhabitants, &c., as delinquent tax payers; and that the collector and the committee of the inhabitants, may be enjoined from borrowing any money on the faith of the inhabitants of the township "for payment of the commutation money for exemption from the draft, of such persons as may be, or shall have been, drafted in said township," and from paying out, or disbursing any money borrowed for the purposes aforesaid, and from proceeding in anywise under said act; and that all other persons may be enjoined from so doing, and for other relief.

A rule to show cause was granted, and a temporary order made, to afford the complainants an opportunity of being promptly heard. The cause is now heard upon the argument of the rule.

Mr. Richey, for complainants, in support of the rule.

The question arises under the act of 25th March, 1864, to authorize the township of Delaware, to raise money by taxation to relieve the inhabitants of said township from the burden of a draft. Pamph. L. 1864, p. 509. The act, it is contended, was designed to carry into effect the act of congress, passed 3d March, 1863. Laws of U. S. 125, § 13.

The act is unconstitutional, because it is calculated to defeat the object which congress had in view. That object was to put down rebellion, and to raise the necessary troops for that purpose.

The state was required by act of congress, to furnish its quota of troops. The state law, if it authorized the act in question, was repugnant to the act of congress. No state can control the exercise of any power by the United States, within the scope of their constitutional authority. 1 Kent's Com. 409-10-12; United States v. Peters, 5 Cranch 115, 135. No state can pass any law impairing the effect of an act of congress. Dartmouth College v. Woodward, 4 Wheat. 518-19.

The object of the act of the legislature is expressed to be, "to relieve the township from the burden of the draft." Its operation is to defeat the draft which congress had ordered.

A state or municipal corporation has no power, under the laws and constitution of this state, to levy a tax on the public to discharge the liability of an individual to serve in the army of the United States. Opinion of the Supreme Court of Maine, 11 Amer. Law Reg. 621.

The tax is used to extort money from individuals, not for a contribution to any public burden. People v. Mayor of Brooklyn, 4 Comst. 423; Reeves v. Treasurer of Wood county, 8 Ohio State R. (new series) 333, 341-3; Beekman v. Sara-

toga and Schenectady R. R. Co., 3 Paige 45; People v. Supervisors of Westchester, 4 Barb. S. C. R. 75; Taylor v. Porter, 4 Hill 140.

If the act itself is not unconstitutional, the use attempted to be made of it is illegal and contrary to public policy. By the resolution of the meeting, the collector is to be held harmless for a clear violation of his duty, and he is instructed to pay the money only to those who will stay at home; not to those who are willing to enter the service of the United States in defence of the Union.

Mr. B. Vansyckel, for defendants, contra.

The act of the legislature was designed to sustain the law of congress. This court has no power to interfere. There is no fraud, or evasion of the act of congress.

If the party is entitled to any relief, he has complete remedy at law by certiorari. A court of equity cannot arrest the exercise of a law, where the party may have relief in a court of law.

The injunction is asked on two grounds.

1. Because it is designed to defeat the act of congress. Its real design is to carry out the law. The object for which the money was raised, was lawful and proper. If the resolu-

tion of the meeting was wrong, it does not affect the act, nor entitle the party to redress under it.

2. Because it is said, it is taking money from one individual to lay the burden upon another.

It was to relieve from a public burden. The draft had not yet been made, nor was it known upon whom the burden would fall. The draft was a burden upon the whole people, not upon a class, or upon individuals. The tax, therefore, was not for the relief of individuals, but of the whole community.

The use to which the tax was applied, was a fair way of applying money raised by tax. It relieved the party drafted, only for that draft.

Mr. P. D. Vroom, on the same side.

The bill is filed by residents of the township and tax payers, as a class. The basis of the bill is want of power in the legislature to pass the law.

The act does not seek to invalidate or impugn the act of Congress. That act is a law for enrollment. It calls out the national forces. It declares what shall constitute the national force, how they shall be enrolled, and prescribes the proceedings which shall be adopted to call them out.

The 13th section offers to the party drafted a triple alternative. Either is lawful. He may go himself, or furnish a substitute, or pay for his exemption. The law does not express or intimate a preference for either of these courses.

The law does not require either the service to be rendered, or the commutation to be paid by the man in person. The service may be performed by a substitute. The money may be paid by a friend. If all pay the commutation, the law is not defeated.

The bill does not state how the law was to defeat the act of Congress. The allegation is, that the legislature meant to defeat the law. The bill should show the ground of fraud. It is not charged that the defendants conspired to procure the law to defeat the act of Congress.

The ground of relief as to private acts of parliament is, that parties procured the act to be passed by fraud and circumlocution, not that parliament designed to defeat the law. Comyn's Dig. "Grant," C. 8, 9. As to the King's grants, see Gough v. Bell, 2 Zab. 486.

This is a public law affecting the rights of the township and the government of the nation. The court cannot take cognizance of the motives of the legislature in passing it. The question is, had the legislature the power to pass the act. It is clear that the party drafted was not bound to go, or pay the commutation in person; a friend might go, or furnish a substitute. May not the legislature furnish a substitute?

There is no direct charge in the bill that the act is uncon-

township.

Hagini & i. t. Termin; at learne.

statement. The some of the ball is that the act is unjust, and in this ground the ball is reducily defeative.

It is east the act is not within the constitutional power of the legislature. But government has the power of taxation is an inherent right, both general and special. It may tax tor particular purposes, and in particular modes. The power of taxation is absolute and unqualified save when it is restricted by the constitution.

One himired men are required by the United States to be furnished by a township. They are laborers in the township, and a source of wealth and strength. The legislature say, by the act, you may tax yourselves to keep them at home. This is clearly lawful. State v. Beannin. 3 Zab. 494; Providence Bank v. Billium. 4 Peters 514.

There is no distinction between paying for volunteers and paying for substitutes; no distinction between paying for substitutes and paying of commutation. There are hundreds of thousands of securities affort in the community, which were issued on that ground. The state is required by Congress to furnish a certain number of men; quotas are allotted to counties and townships. A township furnishes its men by lot. The furnishing of men is a burden on the

If an absolute draft was made, the duty must be personally performed. The government, by the act, has opened the way to avoid the personal performance of that duty. If the township tax to pay substitutes, why not to pay commutation money, which may be used by the national government to procure substitutes?

There is nothing in the bill to give the court jurisdiction. The charge is not that the officers are abusing their power, but that the act is void. The court has no jurisdiction in cases of that kind. The Supreme Court has superintending power over other jurisdictions. There is full relief at law.

This court can act in cases of this ground, only on some special ground of equity. There is no pretence of irreparable mischief. No allegation that the defendants are irre-

sponsible. There is no fraud charged in the execution of the law.

Upon the principle of this bill, every party taxed may come into this court for relief. McCoy v. Chilicothe, 3 Hammond 380.

This court cannot enjoin the collection of a tax, even if it be unconstitutional. Redfield on Railways 481; 14 Ala. 207; Morris Canal & Banking Company v. Jersey City, 1 Beas. 252; Reeves v. Cooper, Ibid. 224.

In the case reported in Maine, the act attempted to be done was without the authority of the legislature.

Mr. Frelinghwysen, Attorney General, in reply.

This is no question of party politics. There is no charge of fraud in the legislation; no allegation of an attempt by them to defeat the national will. The charge is, that the use attempted to be made of the law is in derogation of the act of Congress, and therefore unlawful. If the use is authorized, it is unconstitutional.

By the constitution, Art. I, Sec. 8, Congress has the power to declare war, to raise and support armies, and to provide for organizing, arming, and disciplining the militia. The states reserve all power not delegated to Congress. No state has a right to interfere with the exercise of the power conferred on Congress.

In 1863, Congress did legislate on this subject. The design was to raise armed men to suppress the rebellion. The court will take notice of the object of the law. It was to raise men, not money. So is the preamble of the act. Such is himely.

There are incidents in the law which conflict with its design. There are aliens; persons over forty-five, and under twenty; those who choose to pay \$300. These weaken, but do not alter the great purpose of the law. The \$300 is a forfeiture for not going in person, or sending a substitute.

The construction given to the act by the township authorities is unnecessary. It was never designed by the legisla-

ture, or by the general government. It is in direct contravention of the whole policy of the law. The construction is inadmissible. The intent of the act was to relieve from the burden of taxation. The effect of this construction is to render it more severe.

If every township had acted upon this principle, it would have defeated the whole draft. The township has paid \$31,000, and not raised a man. A new draft must necessarily be made. It merely increases the burden, and defeats the raising of an army.

We say that the township acted upon a gross misconstruction of the intent of the legislature, and of their power. But if the act necessarily requires such construction as has been given to it by the township; if it admits of no construction consistent with the policy of Congress, then it is unconstitutional, being in derogation of an act of Congress upon a subject within the delegated powers of the general government. The act of Congress in question, is identical in principle with a law to issue currency, or to regulate commerce, or to impose taxes upon government securities. The state has no right to meddle with it.

There is a distinction between the action of the township and merely paying for substitutes. The latter aided the government; the former thwarted its purpose, and conflicted directly with its power.

To give the law the construction sought for, would render the property of one not drafted, liable to be taken to discharge the personal liability of another, and would render the law unconstitutional. Service was not a duty en the township; the township was not liable to a draft.

We "the people," the subjects of the general government, are not townships, but people in our individual capacity. States, counties, are recognized in their relation to the federal government, not as corporations, but as geographical districts.

Tax payers as such were not liable to draft; neither mipa, nor women, nor men over forty-five, were liable to the

This is not an exercise of the taxing power, which is admitted to be almost unlimited, despotic, and arbitrary. 2 Coke's Inst. 532; The matter of the Mayor of New York, 11 Johns. R. 80; 5 Burns' Justice 326; \$\frac{1}{4}\$ Story's Com., \$\frac{9}{5}\$ 950; Green v. Craft, 28 Miss. 70.

The tax was not levied for "the service of the state." It was a levying of money under color of the taxing power, not by virtue of the power.

It is said, we raise bounties. This, though plausible, does not really come within the objection. It is a stimulant for the preservation of the nation. For the same object, and with the design of lightening the burden of conscription, we pay for substitutes.

There is a great diversity of opinion as to whether taking private property for private purposes is unconstitutional. Smith's Const. Law 264; Gough v. Bell, 2 Zab. 486; 2 Kent's Com. 340.

A court of equity has an unquestionable right to give relief. There is a perversion of a public law which works a public evil. This the court may prevent by injunction.

It is further insisted, that the public authorities are engaged in a constructive fraud of the law. Under color of the law, they take the property of one man and give it to another. They are making one set of men pay for duty due from others. The collector is ordered, as soon as the money is collected, to pay it out. It was not authorized to be paid until collected. The township officers have indemnified the collector. These are badges of fraud. Taylor. Board of Health, 31 Penn. 73.

There was no remedy at law. There was no time for such relief, even if it might have been granted. Morris Canal v. Jersey City, 1 Reas. 227; McCoy v. Chilicothe, 3 Hamm. 379-80.

The injury is irreparable. Town of Guilford v. Board of Supervisors, 3 Kernan 143.

THE CHANCELLOR. The complainants are before the court, asking that an injunction issue to restrain the execution of a public law. The defendants are a municipal corporation, and its accredited agents, who are about to carry into effect an act of the legislature imposing a tax upon the inhabitants of the township for certain specified purposes. The complainants are inhabitants and tax payers of that township, whose property is to be affected by the imposition They allege that the law imposing the tax is of that tax. unconstitutional and void; or if the law admits of a construction consistent with the provisions of the constitution, they allege that the construction given to it by the township and by its officers, is unauthorized and illegal. In either event, they complain that their property is about to be taken from them under color of a public law, but illegally, and in violation of their constitutional rights. If their complaint be well founded in fact, they are parties aggrieved, and are entitled to redress at the hands of a court of justice. this the proper tribunal to afford that redress?

The only questions involved are the validity and true construction of a public law. The only relief asked is that the execution of that law be arrested. Not so far only as it affects the complainants' property or operates upon their rights, but that its entire operation be suspended until the question of right be adjusted. Now it will be admitted that this is a most delicate exercise of power by any tribunal, and so far as I am aware, has never been exercised to that extent by court of equity. The questions involved are strictly questions of law, within the cognizance and peculiar jurisdiction of the common law courts. The relief which they are competent to afford is full, adequate, and complete. The Supreme Court exercises a supervision and control over all inferior tribunals and corporations, and may control the exercise of their powers so far as may be necessary to prevent abuse, to protect the rights of the citizen, and redress the wrong of every party aggrieved by their irregular and unlawful action. The general rule is familiar, and too well

settled to be questioned, that a court of equity will not interfere where the complainant has adequate relief at law.

It is not denied that equity may and will interfere, even to prevent the assessment and collection of a tax about to be levied under color of a public law. But in all such cases, it is upon some peculiar ground of equity jurisdiction.

In The Mohawk and Hudson R. R. Co. v. Clute and others, 4 Paige 384, the injunction issued to restrain the collectors of the town of Rotterdam, and the several wards of the city of Albany, from collecting taxes which had been imposed upon the capital stock of the railroad company as personal estate in each of those places. It was held, that as the property of the complainants was liable to be taxed but occ, as it had been taxed in two different towns, as it was doubtful to which town the right belonged, the party taxed might bring the claimants of the tax into equity by a bill, in the nature of a bill of interpleader, to settle their conflicting claims. And although it proved not to be a proper case for a bill of interpleader, yet the court having the case before it, and it being admitted that the assessment was illegal, the court by injunction restrained the collection of that tax.

In the Paterson and Hudson R. R. Co. v. The Mayor and Common Council of Jersey City, 1 Stockt. 434, an injunction issued out of this court to restrain the collection of a tax assessed upon the complainants' property. The property had been before assessed, and the Supreme Court had determined that it was not liable to taxation. The bill was in the nature of a bill of peace, to protect the party against the necessity of a multiplicity of suits at law. The legal rights of the parties had been established.

The same principle was recognized in the Morris Canal and Banking Co. v. Jersey City, 1 Beas. 227.

In these cases, the injunction restrained the levying of the tax upon the property of the complainants, without farther interfering with the execution of the law.

The case of The Town of Guilford v. The Board of Supervisors of Chenango Co., 3 Kernan 143, was in its

character and design, more similar to the present case. There the design of the suit was to arrest the entire assessment, on the ground, mainly, that the legislature had no authority to pass the law under which the assessment was made. But the Supreme Court, before whom the case arose, had both common law and equity jurisdiction, and might therefore well take cognizance of the strictly legal question involved. The relief asked, moreover, was not by individual tax payers, but by the town itself in its corporate capacity, who asked relief on behalf of all the tax payers of the town. Here the relief is not sought by the township, but by individuals, against the action of the township in its corporate capacity.

While these cases establish the principle that a court of equity may interfere to restrain the collection of a public tax assessed upon the property of individuals, they establish, with equal clearness, the principle that the bill must contain some peculiar ground of equitable jurisdiction. I find no such ground of relief in the present case. The questions involved are within the jurisdiction of the Supreme Court, and peculiarly proper to be adjudicated there.

It is proper to add, that the rule to show cause in this case was granted, and the temporary order made, to afford the complainants an opportunity of being promptly heard. Upon a question of so much moment, I did not feel at liberty to close the door of the court against them, without a hearing.

Upon that hearing, I am satisfied that there is no ground of relief in this court. If they are aggrieved, their remedy is in another tribunal.

The rule to show cause must be discharged, the injunction denied, and the bill dismissed.*

^{*} The case was brought before the Supreme Court on certiorari, at February Term, 1865. The opinion of the court, affirming the constitutionality of the act of the legislature, was delivered by Elmer J., and is reported in 2 Vroom 189. That decision was appealed from, and reversed by the Court of Appeals, at November Term, 1867; the Chancellor delivering the opinion of the court.

THE MOUNT HOLLY, LUMBERTON, AND MEDFORD TURNPIKE COMPANY vs. PHILIP FERREE and others.

- 1. A certificate of stock in an incorporated company, accompanied by a power af attorney, authorizing the transfer of the stock to any person, is prima facie evidence of equitable ownership in the holder, and renders the stock transferable by the delivery of the certificate. And when the party in whose hands the certificate is found, is shown to be a holder for value, and without notice of any intervening equity, his title as such owner cannot be impeached.
 - 2. The purchaser of a certificate of shares of stock, with an irrevocable power of attorney from the owner, without notice of any intervening equity, has a perfect right to fill up the power to himself, and to recover at law against the company for refusing to assign the stock upon his demand.
- 3. A bill of interpleader is proper, only where the complainant has property or funds in his possession, or under control, to which there are two or more claimants, and the complainant is doubtful to which of the claimants the debt or duty is due. It cannot be sustained where the complainant is obliged to admit, that as to either of the defendants, he is a wrong-doer.
- 4. The want of the affidavit to a bill of interpleader, denying collusion, constitutes a ground of demurrer, but it also may be taken advantage of the hearing.
 - Mr. J. L. N. Stratton, for complainants.
 - Mr. Merritt and Mr. J. Wilson, for Philip Ferree.
 - Mr. F. Voorhees, for administrators of Joseph B. Oliphant.

THE CHANCELLOR. The material question in this cause, is the right of ownership in forty-eight shares of the capital stock of the Mt. Holly, Lumberton, and Medford Turnpike Company. It is admitted that Thomas H. Richards was the original owner, and held in his own name, the certificate of stock. On the 17th of September, 1856, Richards obtained a loan of \$1500 from Wm. C. Manderson, and as

collateral security for the repayment of the loan, delivered to Manderson the certificate of stock, accompanied by an irrevocable power of attorney from Richards to sell, assign, and transfer it unto any other person or persons, and to substitute one or more persons with like power. On the same day, Manderson transferred and delivered the certificate, accompanied by the power of attorney, to James M. Ferree, as collateral security for a loan of \$1500 for ten days. Manderson having failed to pay the loan, the stock was sold on the 30th of June, 1857, after notice to Manderson, and after notice by public advertisement of the time and place of sale, at public auction, in the city of Philadelphia where the parties resided, and struck off to Philip Ferree, one of the defendants, for \$648, he being the highest bidder; and the certificate of stock, with the power of attorney attached, was then and there delivered to the purchaser. 27th of February, 1861, Richards, claiming that he had paid his debt to Manderson, transferred his interest in the stock to Joseph B. Oliphant, whose assignees now claim the stock adversely to Ferree. The only question is, whether Ferree, under the facts stated, acquired a valid equitable title to the stock in question. If he did, it is perfectly clear that any subsequent transfer by Richards of his interest in the stock was a nullity, as against the claim of Ferree.

The certificate of stock, accompanied by the power of attorney authorizing the transfer of the stock to any person, is prima facic evidence of equitable ownership in the holder, and renders the stock transferable by the delivery of the certificate. And when the party in whose hands the certificate is found, is shown to be a holder for value, and without notice of any intervening equity, his title as such owner cannot be impeached. The holder of the certificate may insert his own name in the power of attorney and execute the power, and thus obtain the legal title to the stock, whenever the loan for which it was hypothecated becomes due, or whenever, by the terms of his contract, he becomes entitled to the stock. And such a power is not limited to the person

o whom it was first delivered, but enures to the benefit of such bona fide holder, into whose hands the certificate and sower may pass. And the title of the holder is in no wise affected by a provision in the charter or by-laws of the corporation, that the stock is transferable only on the books of the corporation. Such provision is intended merely for the protection and benefit of the corporation. These principles have been repeatedly recognized by the courts of other states, and in commercial cities, constitute the basis of daily business transactions. Fatman v. Lobach, 1 Duer 354; Leavitt v. Fisher, 4 Duer 1; Commercial Bank of Buffalo v. Kortright, 22 Wend. 348; Bank of Utica v. Smalley, 2 Coven 770; Angell & Ames on Corp., § 354, 564.

The same principles have been adopted and sanctioned by the courts of this state. Rogers v. The New Jersey Insurance Co., 4 Halst. Ch. R. 167; Broadway Bank v. Mc-Elrath, 2 Beasley 26; Hunterdon Co. Bank v. The Nassau Bank, Court of Appeals, June T., 1864.

In the latter case, Mr. Justice Ogden, in delivering the opinion of the Court of Appeals, said: "Considerations of commercial convenience and public policy suggest the true rule upon this subject. Where a certificate of shares of stock in an incorporated company, accompanied by an irrevocable power of attorney from the owner to transfer them, either filled up or in blank, are in the hands of a third party, he is presumptively the equitable owner of the shares, and if he has given value for them without notice of any intervening equity, his title as such owner cannot be impeached."

The application of these principles to the present case is dear, and their operation upon the rights of the parties decisive. The certificate and power of attorney from Richards in the hands of Manderson, were prima facie evidence of his ownership. The certificate and power being transferred by him for a valuable consideration to James M. Ferree, without notice of Richards' equity, he became a bona fide holder and owner of the stock. And upon the failure of Manderson to repay the loan for which the stock was hypothecated,

he became authorized to sell the stock for the payment of his left. As a purchaser at that sale, for valuable consideration. Pullip Ferree became the owner, and vested with all the rights and title of Richards in the stock at the time of its hyp thecation to Manderson. There is no evidence in the ranse, of notice to Ferree of the right of Richards to redeem the stock by tayment of his debt to Manderson.

It is objected that Man lers in could transfer no higher of larger interest in the stock than he himself held, and it is certain that he could not do so to any party having notice of his real title. But his title upon its face was absolute. Pama facic his muniments of title were evidence of absolute ownership. The equity of Richards was not disclosed, and if he suffered by the character of the title he made, it was his own folly. If a party chooses to make an absolute conveyance of land, by way of mortgage security for a debt, he has no remedy at law or in equity, against a bona fide purchaser of the land in for, without notice of his equity of rodemption. In this aspect of the case, it is totally immaternal whether Richards it I, or did not, pay his debt to Manderson, and all the evidence upon that point is irrelevant. The title of Ferree being valid, the claim of the subsequent assigned of Richards and all cluming under him, must be groundless. The title of Ferree, the defendant, is clear. He has a perfect right to fill up the power of attorney to laws. If an i to recover at law against the company for revising to assign the stock men his demand. Park v. A. S. 11, 22 West, 848: Suspent v. Franklin 1 x 30 , 8 P m 98

A solver a policy by the pawner, where reasonably and from the made, and after retrocts to the pawner, is equally occupately as it made by process, process, 2 Kent's Com. 582 (Soly explainments) \$ 310.

And even where the said has been made without such notice, it seems that it cannot be pursued into the hands of a home fine holder without notice of the pledge. Little v. Barker, Refinance (4, 3, 487.

The right is clearly with Ferree. What decree can the court render? No demurrer was filed. The answers are addressed solely to the question of right raised by the bill. No objection was raised as to the propriety of the remedy. Evidence was taken, and the question elaborately discussed upon the merits. Upon the final hearing, objections were first raised to the form of the remedy. Supposing that the failure to file a demurrer, and the acquiescence of the defendants had cured the difficulty, and that the rights of all the parties might be finally disposed of by the decree, the foregoing opinion upon the merits was prepared, but on reflection I am satisfied that no final decree of that character can be made, and that this is not a case for interpleader at all.

There are two sets of claimants to the stock in question. The complainants file their bill of interpleader, asking the court to ascertain and direct to whom the stock should be transferred, and to whom the dividends should be paid. It appears upon the evidence, that the stock had not only been transferred upon the books of the company, but that certificates of stock (for these identical shares) had been issued and re-issued by the complainants before filing their bill. A bill of interpleader is proper, only where the complainants have property or funds in possession, or under control, to which there are two or more claimants, and the complainant is doubtful to which of the claimants the debt or duty is due.

The ground of the jurisdiction is the danger of injury to the complainant, by yielding to the claim of either party. He therefore comes into court saying, I have a fund in my possession, or property under my control, in which I claim no personal interest, and to which the defendants set up conflicting claims. He asks therefore the protection of the court, that the parties shall be decreed to litigate the question between themselves, that he shall have leave to pay the money or deliver the property to the party to whom it of right belongs, and that he shall have his costs. Hoggart v. Vol. 11.

Cutts, 1 Craig & Phil. 201; 2 Story's Eq. Jur., § 806; 3 Daniell's Chan. Prac. 1753.

The bill cannot be sustained, where the complainant is obliged to admit, that as to either of the defendants he is wrong doer. Shaw v. Coster, 8 Paige 339; 3 Daniell's Chan. Prac. 1754.

The complainants have already transferred the stock and issued new certificates. They have assumed the responsibility of acting in advance of the order of the court, and have incurred all the liability that they can incur. They are clearly liable to the owner of the stock as wrong doers. They have voluntarily deprived themselves of the power of obeying the order of the court, if a transfer should be ordered to Ferree, unless indeed they are acting in collusion with the other defendants.

The bill was not properly sworn to. The affidavit contains no denial of collusion between the complainant and any of the other parties. Want of the affidavit constitutes a ground of demurrer, but it also may be taken advantage of at the hearing. Mitford's Pl. 143; 2 Story's Eq. Jur., § 809; Story's Eq. Pl., § 297; 3 Daniell's Chan. Prac. 1761; Shaw v. Coster, 8 Paige 339.

As the defect in the affidavit was not suggested by demurrer or answer, the omission might be regarded as inadvertently made, and not a ground for disclaiming jurisdiction, if in point of fact, there was no reason to apprehend But I think the evidence affords strong ground. for presumption, that there is in fact collusion between the complainants and some of the other parties. On the 24th of April, 1858, Ferree presented the original certificate of stock and power of attorney to the complainants, and requested a transfer of the stock. The officers of the company refused, or neglected to make the transfer. They d not by their bill allege that they had any notice of any claim or equity on the part of Richards, nor do they sugges any reason whatever for their refusal. On the 21st of Janmary, 1861, the president of the company writes to Ferre

Hazard v. Hodges et al.

that he can give him no satisfactory answer, whether the directors will transfer the shares or not; that he will lay the matter before the board at the next meeting, and in form him of the result. About one month after the date of that letter, and nearly three years after the company had received from Ferree the evidence of his title and a demand of the transfer of the stock, Richards executed to Thomas Wilkins, who was the treasurer of the company, a power of at torney to transfer the stock in question to Joseph B. Oliphant, who was the secretary of the company. Richards testified that at the time he executed the power of attorney to Wilkins to make the transfer to Oliphant, he was not indebted to Oliphant, nor can he tell to what, or on what, account the stock was to be credited. The transfer to Oli-Phant was made upon the books of the company, and a new certificate issued to him, without the production of the old certificate, in direct violation of the by-laws of the company. There are other circumstances in the case which tend to strengthen this charge of collusion, but it is unnecessary to Pursue the subject. I am clear that the complainants have no claim to the protection of the court, and that it would be a great wrong to the defendants to impose upon them the costs of this controversy.

The bill must be dismissed with costs. The injunction heretofore issued must be dissolved, and Ferree permitted to Pursue his remedy at law.

ROLAND G. HAZARD vs. CHARLES HODGES and others.

^{1.} In the absence of fraud or unfair practice, erroneous information of the day fixed for a sale of mortgaged premises will not operate to set aside the sale on the ground of surprise, where the mistake was corrected, and the party informed of the hour of sale in ample time to have been present, if he had so elected.

Hazard v. Hodges et al.

2. Where the complainant in execution has become the purchaser of the mortgaged premises, at a sum less than the amount due upon the execution, the sale will not be opened and a re-sale ordered, unless the petitioner will undertake, upon the re-sale, to bid the amount due on the execution.

This case was heard upon the argument of the rule to show cause, upon motion to set aside the sheriff's sale, and that a new sale be ordered.

Mr. Keasbey, for Brown Brothers & Co., the petitioner support of the rule.

Mr. Gledhill, for complainant, contra.

The sale in question was made under THE CHANCELLOR. a decree for the foreclosure and sale of mortgaged premise The complainant became the purchaser for \$3050. amount due upon the decree exceeded \$12,400. The prem ises had been previously sold under a second mortgage t Brown Brothers & Co., and conveyed to John N. Whiting. their attorney, for their benefit. At the time of the sale under Hazard's mortgage, the title to the equity of redemption remained in Whiting, who was in possession of the Brown Brothers & Co. now ask that the sale premises. under Hazard's decree be set aside on the ground of surprise. The case made by the petition is, that the sale had been regularly advertised, and adjourned to the 27th of February. On that day the attorney of the petitioners went to Paterson, for the purpose of attending the sale, and was there erroneously informed by the sheriff that the sale had been adjourned, not to that day, but to the 5th of March, a week later. Relying upon this information, Whiting took the train to return to New York. On arriving at Jersey City, he received a telegram stating that the sale would tak place, and requesting him to return. He did not return The sheriff in his absence proceeded to a sale, and the prem ises were purchased by the complainant for \$3050. Th

Hazard v. Hodges et al.

petition alleges, and it is not denied, that they are worth \$15,000.

There is no ground for the imputation of fraud or unfair The sheriff acted under an honest mistake, relying upon a supposed entry in his docket. As soon as the m istake was discovered, a dispatch was sent at the sheriff's request, and delivered to Whiting, at Jersey City, stating that the sheriff had been mistaken, that the sale would be made, and desiring his return. The sale was not made until after the arrival of a train at Paterson, by which he might have returned and been present at the sale. Instead of returning, he sent the following telegram to his agent at Paterson: "To Isaac Van Wagoner. Message too late. sheriff sell at peril—if he sells, give my notice in full." Van Wagoner attended the sale, and before it was made, gave notice that Whiting had bought the property at sheriff's sale, and claimed to own it. He forbid the sale in Whiting's name, and said the sheriff would sell at his peril. nevertheless proceeded, and the premises were struck off to the complainant in execution before five o'clock.

It is clear that the mistake of the sheriff was corrected in time to have enabled the attorney of the petitioners to be present at the sale. He was in fact represented at the sale by his agent, who acted and gave notice pursuant to his instructions. It appears, moreover, from the evidence, that the sale had been previously adjourned on two occasions, at the request of Van Wagoner, acting in behalf of Whiting. That Whiting was not personally present on either occasion. That on the 30th of January, to which time the sale had been adjourned, Van Wagoner was instructed to procure another adjournment, if possible; and if not, to forbid the sale. The sale was adjourned in pursuance of a request made under that instruction.

The attorney of the petitioners, then, was not prevented from being personally present at the sale. He was represented by his agent, who literally obeyed his instructions. Nor does it appear that the attorney intended, or that the

Van Houten v. First Reformed Dutch Church.

petitioners are now willing to give more for the propert than was bid by the complainant. If they are, it can be c no avail to open the sale, unless they are willing to bid be yond the amount due on the complainant's execution. admitted that the petitioners purchased and hold the pren ises, subject to the complainant's mortgage. It is not sus gested that the amount for which the execution issued is no justly due, or that the complainant in execution is not en titled to have that amount satisfied out of the premises. can be of no avail to open the sale, unless the petitioners as The petitione willing to bid that amount upon a re-sale. It will, there allege that the premises are worth \$15,000. fore, be ordered, upon the petitioners' undertaking upon a r sale being made, to bid the amount due on the complainant execution, that the sale be set aside, and the premises resold. If the petitioners decline to make this stipulation, tl rule to show cause must be discharged.

JOHN R. VAN HOUTEN and others vs. ALEXANDER MCKE WAY and others, Trustees of the First Reformed Dut Church of Totowa, and others.

- 1. Where the pews in a church have been purchased and a title given the purchaser, he has but a qualified interest. His right is subject to the of the trustees or owners of the church, who have the right to take dow rebuild, or remove the church for the purpose of more convenient worshi without making any compensation to the pew-holders for the tempora interruption.
- 2. A court of equity will not, on the application of a pew-owner, e join the pulling down and rebuilding, or removal of the church edifice the trustees, whenever it shall be found expedient and proper. Nor wit affect the question, that the application is made by a majority of t church and congregation entitled to vote at its congregational meetings.
- 3. The common law right of alienation by religious corporations has n been restrained in this state by statute.
- 4. The real and personal estate of a religious corporation is trust pretry, not to be controlled by the will of the cestuis que trust, much less!

ľ

Van Houten v. First Reformed Dutch Church.

- a bare majority of them, but by the trustees, the duly constituted guardians of the rights and interests of the congregation.
- 5. The Court of Chancery is vested with the same jurisdiction over corporate trusts that it ordinarily possesses and exercises over other trust estates. It will guard jealously against any perversion of the trust funds by the corporation, and will hold the trustees personally responsible for a breach of trust.
- 6. Where the material charges of the bill are fully denied by the answer, an injunction will not be granted, even though the bill disclose clear ground of equitable relief.

Mr. A. S. Pennington, for defendants, in support of the motion, cited Nix. Dig. 723, § 11-12-13-14; Magie v. German Evang. Dutch Church, 2 Beas. 77; Den v. Bolton, 7 Halst. R. 206; Nix. Dig. 722, § 4; Ibid. 724, § 17.

Mr. Woodruff and Mr. P. D. Vroom, for complainants, contra, cited Scott v. Ames, 3 Stockt. 261; 2 Story's Eq. Jur., § 1268, § 1276; Doremus v. Dutch Reformed Church, 2 Green's Ch. R. 346; Hill on Trustees, 42, 555, 562-3; Hendrickson v. Decow, Saxton 600; Hopkins v. Hopkins, 1 Atk. 424; King v. Donnelly, 5 Paige 46; In the matter of Van Schonhoven, Ibid. 559; Brown v. Vandyke, 4 Halst. Ch. R. 799; Kean v. Johnson, 1 Stockt. 408; Rex v. Mayor of Rippon, 2 Salkeld 433; S. C., 1 Ld. Raymond 563; State v. City of Newark, 3 Dutcher 198; United States v. Wright, 1 McLean 509.

THE CHANCELLOR. The complainants' bill in this cause is exhibited by members of the congregation of the First Reformed Dutch Church of Totowa, in the city of Paterson, and pew-holders in said church, claiming to be a majority of the members of said church and congregation, entitled to vote at its congregational meetings.

The complainants seek a perpetual injunction to restrain a sale by the corporation, of the church in which the congregation worship, together with the lot on which the same is erected.

It is a pure injunction bill. It asks no other relief save

Van Houten v. First Reformed Dutch Church.

a perpetual injunction, restraining the defendants from a sale of the premises. On filing the bill, a temporary injunction was issued. The defendants having answered, now move to dissolve the injunction. The answer furnishes a statement of the grounds upon which the defendants are proceeding to a sale of the present church edifice and the erection of a new one, and a history of the difficulties out of which the present controversy has arisen.

Before considering the defence made by the answer, it is necessary to examine the case made by the bill itself, to determine whether there be any equity in the bill, or any ground upon which the prayer for injunction can be sustained.

The first ground upon which relief is asked is, that the complainants, or some of them, have rights in the present church edifice which will be impaired or sacrificed by a sale of the property. The claim is founded upon an instrument bearing date on the fifth day of September, A. D. 1831, purporting to have been made by the First Reformed Dutch Church of Totowa, and to be executed under their corporate seal, and the signature of their president, and which the bill alleges was the contract of the corporation. By the instrument it is recited, that the church had purchased a lot in the city of Paterson, that a large sum of money had been raised by subscription, for which pews in the church erected on the said lot had been taken; that at a meeting held on the 18th of April, 1831, it was by the congregation of said church, among other things, resolved unanimously, that The First Reformed Dutch Church of Totowa sign an instrument of writing of the following import, viz. that if the new church should burn down and the ground lots should be sold, then the money thence arising should be returned to the signers and payers of the following subscription list (which list was thereto annexed) and to those who had at the first vendue purchased and paid for pews in the church, and who should thereafter purchase and pay for pews in the church, according to and in proportion to the original purchase money and sums subscribed.

Van Houten v. First Reformed Dutch Church.

And it was in and by the said instrument stipulated, that the new church erected on the said lot should burn down, id the ground lots should be sold, that then the church ould divide the surplus money arising from such sales, ter paying the debts of the church then contracted, or hich the church might thereafter contract, amongst those ho had purchased, or who should thereafter purchase pews said church, and pay for the same to the value of said ews at the time of purchasing them; and if any of those ho had subscribed towards the building of the church, and ad paid the amount thereof, or who should thereafter pay ie amount thereof, and should not take pews for the same, ney should be entitled to be paid equally with the rest. .nd if there should not remain money enough, after paying ne debts of the church, to pay the above amounts in full, hen the persons so subscribing and paying, should come in or a dividend of said surplus money, to be made ratably, n proportion to the amounts they shall have severally paid.

The contract provides for one contingency only, viz. the surning down of the church and the sale of the ground lots. Both the resolution of the congregation and the terms of he contract look to that contingency alone, and to no other. The complainants allege that the object and intention of the greement was, that the lots should be considered as belonging to the subscribers and contributors to the erection of the thurch and the owners of the pews, and that if sold, the proceeds of the sale should be divided among them, and not be appropriated to any other purpose.

The intention of the parties to the contract must be sought or in the terms of the instrument itself, and those terms nust be understood and construed according to their natural import.

The construction asked by the complainants to be put upon the contract, is in direct conflict with its terms. The sitle to the land was in the corporation. The trustees were invested with the legal title in fee, in trust for the purposes of the corporation. There is in the contract no intimation

Van Houten v. First Reformed Dutch Church.

of a purpose or design to interfere with their legal ownership in, or control over the property. There is no restraint upon their right to sell or dispose of it as they should deem proper and for the interests of the congregation; no intimation that the trustees should not remove the church to a more convenient or advantageous locality. No such inference can by possibility be drawn from the terms of the instrument. The agreement gives to the subscribers and pewholders no title to the land, and no interest in it. They are entitled only to the proceeds of the sale of the lot, and to those, only after all the debts then contracted or which the trustees might thereafter contract, should be paid and satis-It gives to the complainants, or to the subscribers and pew-holders, a right to the proceeds of the sale of the lot, only upon the contingency of the destruction of the building by fire. It furnishes no ground for relief under the circumstances disclosed by the bill.

But if it be admitted that in case of the sale of the property in its present condition, the subscribers and pew-holders by force of the agreement, would be entitled to the proceeds of the sale, it would give them no right in equity to interfere with the right of the trustees to sell or encumber the premises. All that they could ask would be their ratable proportion of the proceeds of the sale of the lot. On this ground it is very clear that the bill furnishes no title to relief.

Where the pews in a church have been purchased and a title given to the purchaser, he has but a qualified interest. His right is subject to that of the trustees or owners of the church, who have the right to take down, rebuild or remove the church for the purpose of more convenient worship, without making any compensation to the pew-holders for the temporary interruption. Freligh v. Platt, 5 Cowen 496; Shaw v. Beveridge, 3 Hill 26; Heeney v. St. Peter's Church, 2 Edw. Chan. R. 612; In the matter of the Brick Presb. Church, 3 Edw. Ch. R. 155; Wentworth v. First Parish in Cantan, 3 Pick. 344; Howard v. First Parish in North Bridgewater, 7 Pick. 138.

1

Van Houten v. First Reformed Dutch Church.

And a court of equity will not, on the application of a pewwner, enjoin the pulling down and rebuilding or removal of the church edifice, by the trustees, whenever it shall be found expedient and proper. Heeney v. St. Peter's Church, Edw. Ch. R. 608; In the matter of the Brick Presb. Church, Bedw. Ch. R. 155.

Another ground of relief relied on by the complainants is, that they constitute a majority of the church and congregation entitled to vote at its congregational meetings. To whatever degree of consideration this fact might be entitled, in considering the expediency or propriety of a sale, it can constitute no distinct ground of relief.

At common law every corporation aggregate had power to alien or dispose of its lands in fee, or to create any lesser estate therein, unless restrained by their charter or by statute. 2 Kent's Com. 280; Angell & Ames on Corp., § 187; Co. Litt. 44 a—300 a.b.; Trelawney v. Bishop of Winchester, 1 Burrow 221; Dutch Church v. Mott, 7 Paige 83. This common law right of alienation by religious corporations has not been restrained in this state, as it has been in England, by statute. Nor is the power of alienation clogged, as in England, by the vesting of the legal title to the church and church lands in the parson, a corporation sole, not having the absolute fee, having no power even of leasing the property beyond his own life, and whose grant must be confirmed by the patron and ordinary. Co. Litt. 300 a. b.

By the statute of this state, every corporation has power to hold, purchase, and convey, such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter Nix. Dig. 151, § 1.

And by the act incorporating the trustees of religious societies, the trustees, by their name of incorporation, are authorized to acquire and hold lands and chattels, in trust for the use of the society or congregation, to an amount in value not exceeding \$2000 a year, and the same or any part thereof, to sell, grant, assign, demise, alien, or dispose of. The same power is by the act conferred specially upon the trustees of

Van Houten v. First Reformed Dutch Church.

the Reformed Dutch churches. Nix. Dig. 722, § 3; 723, § 13. The power of holding, controlling and disposing of the real as well as the personal estate of the corporation is conferred, not upon the congregation or society at large, but upon the trustees by their name of incorporation. It is trust property, not to be controlled by the will of the cestuis que trust, much less by a bare majority of them, but by the trustees, the duly constituted guardians of the rights and interests of the congregation, and who are responsible for the faithful discharge of their duty.

The Court of Chancery is vested with the same jurisdiction over corporate trusts, that it ordinarily possesses and exercises over other trust estates. 2 Kent's Com. 280.

Is will guard jealously against any perversion of the trust funds by the corporation. It will hold the trustees personally responsible for a breach of trust. But there is in this bill no allegation that any breach of trust or perversion of the trust property has been committed or meditated by the trustees. It is not alleged or suggested that they are about to sell the church to appropriate the proceeds to an unlawful purpose, or to deprive the congregation of a place of worship, or from any sinister or corrupt motive to remove the church to an improper locality.

The gravamen of the bill is not that the rights of the cestuis que trust will be impaired, or that the interests of the congregation will be prejudiced by the proposed change, but that the pecuniary interests of the complainants, or of some of them, will be injuriously affected. It has already been said that the complainants have no legal rights in the church edifice, which will be protected by the restraining power of this court.

Whether the interests of the church and congregation require that the church should be removed to another locality, is a question which the authorities of the state and of the church have wisely committed to the judgment and discretion of its board of trustees. In the Reformed Dutch Church in this state, the trust has been delegated to the consistory,

a body consisting of the pastor, deacons, and elders of the church, the guardians at once of its spiritual and temporal interests. I know not where the trust could be more wisely or safely lodged. And it would be, in my judgment, an unauthorized exercise of power, and one dangerous to the peace and welfare of the church, if a civil tribunal, at the instance of any portion of the congregation, however respectable, should wrest from the consistory the exercise of its acknowledged powers, upon the mere allegation that a majority of the congregation differed from them in judgment.

There is, in my opinion, no ground upon which this injunction can be sustained, and no equity in the complainants' bill. The temporary injunction must, therefore, be dissolved and the bill dismissed.

Owing to the importance of the principles involved, I have felt it my duty to dispose of the cause upon the case as made by the complainants' bill. I deem it due to the parties interested to add, that if I had arrived at a different conclusion in regard to these questions, and had been satisfied that the complainants had, by their bill, disclosed clear ground of equitable relief, the injunction must, nevertheless, have been denied, inasmuch as the material charges of the bill are fully denied by the answer.

ABRAHAM VREELAND and others vs. DANIEL R. VAN RYPER and others.

A testator, by his will, devised as follows: "I do give the residue of my real estate to my children, share and share alike, but the shares which may fall to my sons, George and Michael, I do give to them only during their natural lives, and after their death, to go to their children, share and share alike, and if any of their children shall die before their father leaving children, then the children to take their father's or mother's part.", George died leaving no issue. Held—

- 1. George and Michael, the devisees for life as well as the other children of the testator, take several, not joint interests in the residuary estate.
- 2. The estate of each tenant continues during his life, and upon his death, goes to his children. If he have no children, the devise over fails, and as to that reversionary interest, the testator died intestate.
- 3. The remainder of the share devised to George, vests not in the surviving children of the testator, but in his heirs-at-law.

Richard Van Ryper, late of the county of Hudson, by his will devised the residue of his real estate to his children; two of the shares being limited over to his grandchildren, after the determination of the life estates. A bill for partition having been filed by certain of the devisees, and a partition having been found impracticable, the land was sold under a decree of the court, and the proceeds of the sale of the shares thus limited over were invested, pursuant to the direction of the statute, under the order of the court. One of the tenants for life has since died, and the commissioner, in whose hands the funds are, has filed his petition, asking for direction to pay over the proceeds of the sale of that share to the parties legally entitled thereto.

Mr. Bentley, for petitioner.

THE CHANCELLOR. The only question is that suggested by the master in his report, as to the legal effect and operation of the devise. The devise is as follows: "I do give the residue of my real estate to my children, share and share alike; but the shares which may fall to my sons George and Michael, I do give to them only during their natural lives, and after their death, to go to their children, share and share alike, and if any of their children shall die before their father, leaving children, then the children to take their father's or mother's part." George Van Ryper, one of the tenants for life, died, leaving no issue.

George and Michael, the devisees for life, as well as the other children of the testator, take several, not joint interests in the residuary estate. The devise is to them, "share

and share alike." Each takes a separate share of the estate. The estate of each tenant continues during his life, and upon his death goes to his children. If he have no children the devise over fails, and as to that reversionary interest, the testator died intestate. This is the only fair and reasonable construction of the residuary devise. The language throughout must be applied to the estates, to the lives, and to the children of each tenant distributively, reddendo singula singulis; as if he had said, I give them their shares for their respective lives, and after their respective deaths, to go to their children severally. He never intended that both life estates should continue as long as the survivor lived, and upon his death, to go to all the children of both tenants who might be in esse, per capita. It is a well settled rule of construction, that a joint covenant shall be taken as several in respect of the several interests of the covenantees. warranty to two who are severally seized, shall enure as several warranties. So a grant, joint in its terms, shall be deemed several, where the grant cannot take effect but at several times. As if a remainder be limited to the right heirs of A. and B., (A. and B. being alive,) in which case, though the words are joint, the heirs shall take severally. Justice Windham's case, 5 Coke 7.

By the residuary devise, the share of each tenant for life, upon his death, is limited over to his own children, in exclusion of the children of the other devisee. The children of Michael, therefore, take no interest in the remainder of the share devised to George, upon the determination of the life estate. As to that interest, the testator died intestate, unless it fall within the operation of the residuary clause of the will, and be thereby vested in the children of the testator. The general rule is, that a residuary disposition of real estate will carry all the contingent or reversionary interests, which the specific devises of the will leave undisposed of. Wherever, therefore, the specific devises comprise only a partial or contingent interest in the lands of the testator, leaving an

ulterior or alternate interest undisposed of, such undisposed of interest will pass by a general residuary devise. 1 Jarman on Wills, ch. 21, p. 588, 594.

If, therefore, the gift to George and Michael had been made by a specific devise, which left the fee of the share devised to George for life undisposed of, it would fall within the operation of the residuary devise, and pass thereby to the children of the testator. But this undisposed of interest results, not from any specific devise, but from the terms of the residuary devise itself. The objection is not, that the estate undisposed of is not of a character to fall within the operation of the residuary clause, but that the terms of the residuary clause itself do not include it. That clause, while it purports to dispose of the testator's entire estate, and to render him completely testate in regard to every portion of his estate, did not take effect as to the share of George, limited over to his children upon his death, by reason of his dying without issue. For that contingency the testator might have made provision, but did not do so. It remains undisposed of by the will. The estate, therefore, vested not in the surviving children of the testator, but in his heirs-at-The funds in the hands of the commissioner must be paid accordingly.

The master's report should ascertain with precision, who are entitled, as the heirs-at-law of Richard Van Ryper, to share in the distribution of the fund, and the shares to which they are respectively entitled. The report is defective in another particular. It does not state, with accuracy, the amount of the fund in court, and though it does not allege in express terms, it leaves it to be inferred that the fund has remained in court uninvested for several years. If the fact be so, it ought to be explained, or the trustee charged with interest for suffering the money to be uninvested. The fact appears to be, on reference to the clerk's books, that the money, after having been paid into court, was ordered to be invested, and remained at interest until very recently, and that the amount now in court does not correspond with the amount

reported by the master. The report, as it now stands, is open to misconstruction, and will give rise to difficulty. It must be referred back to the master for correction.

STEPHEN VREELAND vs. MINDERT VAN HORN.

- 1. No assignment in writing is necessary to transfer the title to securities delivered under the provisions of a trust deed. A valid title passes by delivery.
- 2. Securities delivered under the provisions of a trust deed, will not be decreed to be re-delivered at the mere will of the grantor.
- 3. It does not lie in the mouth of a cestui que trust, while competent to judge of his own interest, to complain of acts as breaches of trust, which were occasioned by his own neglect or misrepresentations.

Mr. Winfield, for complainant.

Mr. Bentley, for defendant.

THE CHANCELLOR. The controversy in this cause relates to the legal effect and operation of a deed of trust, executed by the complainant to the defendant on the 25th of June, 1858, and to the due execution of the trusts by the grantee in the said deed.

The recital and specification of the trusts of said deed are, in substance, as follows:

- "Whereas, the grantor is desirous of being relieved from the care, trouble, and management of his estate, real and personal, and desires to place the same in the hands of the grantee, for the following purposes, viz.
- "1. To pay over to the grantor, in quarter yearly payments, all the income that may arise from the rents and profits of the real estate, after discharging all the expenses incident to the management thereof, and all taxes, repairs, and improvements to be made thereon.

"2. Upon the decease of the grantor, to convey the said real estate to his children and heirs, agreeably to the will and codicils of the grantor, then made and in force, and in the hands of P. B., and which, it is thereby agreed, shall remain in his hands.

"3. The grantee to take from the income of the said real estate, and the income of the grantor's personal estate, so much money as shall be necessary for the proper support of the grantor's wife, Hannah, as might be fixed by the Chancellor, or by agreement between the grantor and his wife, and to dispose of the personal estate, after deducting a reasonable compensation for executing the trust, as the same is disposed of by the will and codicils of the grantor, theretofore duly made."

The grantor conveys by the said deed to the grantee, in fee, several tracts and parcels of real estate, the grantee covenanting that he will faithfully execute the trusts aforesaid, and at the death of the grantor, will convey the real estate, and dispose of the personal estate, in the manner directed by the grantor in and by his said last will and the codicils thereto.

The bill alleges that the complainant never conveyed or delivered to the defendant any of his personal property in trust, but that soon after the execution of the deed he gave to the defendant, for the purpose of collection, certain bonds. mortgages, and other evidences of debt, which the defendant claims to hold as trustee for the complainant by virtue of the sail deed, and asks that the defendant be decreed to deliver and pay over to the complainant all the personal property in his hands, and which he claims to hold in trust. fendant, by his answer, denies that he has any of the personal property of the complainant, except such as he received under the said deed of trust. The deed makes no transfer whatever of personal property, although it is manifest that it was the design of the parties that it should do so. deed recites that the grantor was desirous of being relieved pem the care, trouble, and management of his estate, real

and personal, and to place the same in the hands of the grantee, upon the trusts, among others, that the grantee should take from the income of the real and personal estate, so much as might be necessary for the proper support of the grantor's wife, and should dispose of the personal estate, after deducting a reasonable compensation for executing the trust, according to the will of the grantor. And the grantee covenants that he will faithfully execute the said trusts, and at the death of the grantor, will dispose of the personal estate in the manner directed by his will. It is obvious, therefore, that the parties intended and understood that personal property would pass under the terms and operation of that deed, though none is, in fact, assigned by it.

The grantee testifies, that on the day of the execution of the trust deed, he received by delivery the bonds, mortgages. and securities which were designed to be conveyed to him in trust, with the exception of one mortgage, which was not then at hand; that he has ever since had the control of the said securities, has collected the interest upon them, including the mortgage not delivered, and paid the proceeds to the complainant, under and in pursuance of the trust created by said deed. That the grantee then received these securities from the grantor is not denied, nor is it denied that the grantee has since collected the interest upon them and paid it over to the complainant. The grantor, himself, has given no information upon this point. The receipts given by him for the interest upon these securities, are in repeated instances given to Van Horn as trustee, and in the same terms as receipts for the rent of real estate are given. It is obvious that the rents of the real estate and the interest of the Personal securities were collected and accounted for by Van Horn in the same character, viz. as trustee under the provisions of the trust deed. It is not suggested that any other securities or property were referred to in the various clauses of the trust deed which relate to personal property.

The securities having been delivered under the provisions of the trust deed, a valid title to them passed by delivery. No

assignment in writing was necessary to transfer the title. Hutchings v. Low, 1 Green's R. 246; Allen v. Pancoast, Spencer 68; Morris Canal and Banking Co. v. Fisher, 1 Stockt. 696. The trustee has the legal right to the securities thus transferred, and authority to invest and manage the funds under the provisions of the trust deed for the purposes specified in the trust.

The charges of unfaithfulness against the trustee are unsupported by the evidence. The report of the master shows that the trustee has fully accounted for all the funds which have come to his hands. The report has not been excepted to, and it is fully supported by the evidence. I do not understand the complainant himself in his evidence, as affirming that the trustee has withheld from him one dollar of the income, either of the real or personal estate. The defendant testifies that the entire income of the property has been accounted for and paid over to the complainant without any deduction for commissions as trustee.

The alleged errors and mismanagement in the execution of the trust appear to have been either the result of honest mistake, or to have been occasioned by the acts of the complainant himself. The investment of a portion of the trust funds by the trustee in his individual name, was indiscreet and injudicious. But there is no pretence that it was the result of any dishonest purpose. The interest was regularly accounted for, and as soon as the mistake was pointed out, the error was corrected and a written declaration of trust furnished to the complainant. There seems no reason to doubt that the fact is as stated by the trustee, that the error was occasioned by the inadvertence of the trustee in not stating to the attorney by whom the investment was made, that the money was a part of the trust funds.

A more serious ground of complaint is that the trustee suffered the taxes and water rents assessed upon the real estate to remain unpaid until the property was sold for the taxes and rents, and the trust fund thereby subjected to unnecessary charges and burdens. This unexplained, is such

mismanagement on the part of the trustee, as should subject him to the payment of the entire extra charge thus unnecessarily imposed upon the trust fund. But it is clearly shown that the difficulty was occasioned by the acts and representations of the complainant himself. The income of the trust fund was paid over to the complainant, or was permitted by the trustee to be received by him, upon his solicitation, and upon the assurance that the taxes and water rents had been paid or would be paid by himself. It does not lie in the mouth of the cestui que trust, while competent to judge of his own interest, to complain of acts as breaches of trust, which were occasioned by his own neglect or misrepsentations.

The errors of the trustee in not keeping regular accounts, and in not taking from the cestui que trust more specific receipts, admit of the same explanation. It appears from the evidence that the complainant himself insisted upon collecting the rents of his real estate, and in many instances received them in small payments before they were due, and either omitted or refused to give to the trustee satisfactory accounts or specific receipts for the moneys thus received. If the cestui que trust were an infant or otherwise incapacitated to judge of his interests, these omissions of the trustee But under the peculiar would be open to grave observation. character of this trust, they are readily susceptible of explanation, consistent with good faith and an honest discharge of duty on the part of the trustee. Looking to the origin and character of the trust, the standing and previous relation of the parties, and the subsequent management of the fund, the errors of the trustee are fairly attributable to a disposition to gratify the wishes and feelings of the complainant, rather than to any disposition to defraud or wrong him. There is nothing in the evidence that can justify a charge against the trustee of fraud or abuse of trust, or afford any ground for his removal from office.

Another ground of relief disclosed by the bill is, that the net income of the trust estate is insufficient for the support

and maintenance of the samplement and his family, and the court is asked to decree that the trustee shall sell and dispose of such portion of the trust property as is least productive, and pay over the proceeds thereof to the support and maintenance of the complainant. The evidence does not prove that the insome of the estate is insufficient for the support of the complainant and his family. But if that fact were clearly established, the proposed sale of the real estate is not in a combined with the provisions of the trust deed. The trust declarate is that the complainant shall receive the net income of the real estate laring his life, and that upon his decease the real estate shall be conveyed to the children and hears of the complainant, agreeably to his will and codicing that exist or and in force.

Whether the court would unistake, under any circumstances to control the trusts upon which the land was conveyed and direct a different disposition of the estate, it is uniscessary now to inquire. It is clear that there is nothing in the use now before the court, either upon the allegations of the hill or upon the procise to warrant such interference with the trusts declared by the complainant.

The report of the master and the account as stated by him = mast be businemed. All the relief prayed for by the bill, excepting so far as relates to the account, is defied.

GEGENE W. SAVANE, receiver of "The New Jersey Frankunite Company," vs. Assiev H. Ball and others.

^{1.} Where A, has given his note to B, at the instance, and for the benefi ≠ of C, and in consideration, thereof ill has given his note to A, an injunction will not be to restrain proceedings at law by A, upon C's note, on the granni than A e note to B, has never been paid.

Promissory notes exchanged between parties, constitute the one a good
 consideration for the other.

^{2.} The act of an officer de facto is good, wherever it concerns a third per-

son who had a previous right to the act, or had paid a valuable consideration for it.

4. The New Jersey Franklinite Company agreed with the firm of Ball & Company, that if the latter would contract to build a certain railroad, upon the basis of a stock subscription, and would subscribe for \$200,000 worth of the stock of the railroad company for that purpose, they, the Franklinite Company, would convey as many shares of the stock as should be agreed upon by their president and Ball & Company, subject to the approval of the directors. Ball & Company subsequently entered into the contract, and subscribed for \$200,000 worth of the stock of the railroad company. The president of the Franklinite Company thereupon agreed to transfer 8000 shares of the stock of that company to Ball & Company. The action of the president was approved by the directors, and the stock transferred. The resolution of the directors was subsequently approved by the stockholders. Held, that even if the road was never built, and the stock never paid for, and admitting that the Franklinite Company are enitled in equity to a return of their stock, it does not in any wise impair he fairness or validity of the issue of the stock, or the legality of the election of directors chosen by votes given upon the stock thus issued

5. The mere fact of the insolvency of a company does not of itself, render nvalid or fraudulent a note given for a bona fide debt.

This bill was filed to enjoin proceedings at law upon a promissory note for \$5000, purporting to have been given by "The Consolidated Franklinite Company of New Jersey," to A. H. Ball & Company, on the 26th of April, 1861. The injunction issued, pursuant to the prayer of the bill, on the 12th of December, 1863. The defendants, having answered, now move to dissolve the injunction, on the ground that the equity of the bill is fully denied by the answer.

Mr. Ranney, for defendants, in support of the motion.

Mr. B. Williamson, for complainant, contra.

THE CHANCELLOR. The grounds upon which the injunction was prayed for and allowed were, that the note was without consideration, and that it was obtained by fraud.

The charges of the bill are explicitly denied by the answer, and the real consideration of the note is set forth. It is averred that one Samuel F. Headley held in his hands stock

of the corporation to the amount of \$260,000, and that Ball & Company, at the instance of the corporation, procured the transfer of the stock to the corporation, through one Henry Van Renssalear, for \$5000, which sum was paid by Van Renssalear to Headley in cash, and by Ball & Company to Van Renssalear, in the notes of the said Ball & Company. objected to this statement of the consideration, that there is no averment that the notes to Van Renssalear were ever paid, or that Ball & Company have ever advanced one dollar on account of them. The notes of Ball & Company were given to Van Renssalear, who advanced the \$5000 in cash, at the instance and for the benefit of the company. Whether, therefore, the notes of Ball & Company are paid or not, is a matter with which the company have no concern. have received full value for their note, and the loss by Van Renssalear can constitute no defence to an action upon the note of the company. There was a good and valid consideration for the note at the time it was given. Even if the notes of Ball & Company had been given directly to the corporation in exchange for its note, it would have been a sufficient The one promise is a good consideration for consideration. the other. Gilbert v. Duncan, 5 Dutcher 145, 529; Cameron v. Chappell, 24 Wend. 94; Dowe v. Schutt, 2 Denio 621; Davis v. McCready, 17 New York R. 232.

The bill further charges that the directors of the company, by whom the note was authorized to be executed, were not legally elected, and were not qualified to act as directors for various reasons, and among others, because at the time of their election they were not stockholders of the company. And it is urged that the charge of their not being stockholders is not explicitly denied by the answer. I think the answer, in connection with the affidavit of one of the defendant, does contain a full denial of the charge. But if it be admitted that the answer upon this point is not satisfactory, and that the directors were neither duly qualified, nor legally elected, it will not affect the validity of the note. It is admitted that the directors, by whom the note was authorized

to be made, were by color of election, directors de facto. The act of an officer de facto is good, wherever it concerns a third person who had a previous right to the act, or had paid a valuable consideration for it. Riddle v. County of Bedford, 7 Serg. & R. 392; Angell & Ames on Corp., § 287.

The bill further charges, that the stock which was voted upon at the election for directors, and by virtue of which the directors were elected, was issued fraudulently and without consideration to Ball & Company, and that therefore the election was null and void.

This charge of fraud is denied, in express terms, by the answer, and the consideration for the issue of the stock is set out specifically at length. The substance of the answer upon this point is: That the Sussex and Warren Railroad Company proposed to construct their road upon the basis of a stock subscription. That thereupon the Franklinite Company, who were interested in the construction of the road, applied to Ball & Company, who were railroad contractors, to build the road upon the basis of a stock subscription. was thereupon agreed by the directors of the Franklinite Company, that if Ball & Company would contract to build the road upon the basis of the stock subscription, and would subscribe for \$200,000 worth of the stock of the railroad company for that purpose, the Franklinite Company would convey as many shares of the stock as should be agreed upon by the president and Ball & Company, subject to the ap-Proval of the directors. That Ball & Company having sub-sequently entered into the contract with the railroad company to build the road, and having subscribed for \$200,-000 worth of the stock of that company, the president of the Franklinite Company agreed to transfer 8000 shares of the stock of that company to Ball & Company. That the directors of the Franklinite Company subsequently approved the action of the president, and the stock was transferred accordingly. And that at a meeting of the stockholders subsequently held, the resolution of the directors was approved by the stockholders.

It is unnecessary to express any opinion in regard to the character or operation of this contract, further than as i 1 may affect the validity of the issue of the stock of the Frank linite Company to Ball & Company. The allegation of the defendants in answer to the charge that the stock was issuewithout consideration is, that it was issued in consideration of an engagement by Ball & Company to construct a railroac at the instance of the Franklinite Company, and a subscription for that purpose by Ball & Company for \$200,000 wort≥ of the stock of the railroad company. Assuming that the railroad was never built, and the stock consequently neve = paid for, admitting that the Franklinite Company are entitled in equity to a return of their stock, it does not, in an wise, impair the fairness or validity of the issue of the stock or the legality of the election of directors, chosen by votegiven upon the stock thus issued.

But there is another answer to this part of the case, viz that every vote cast at the election was for the same directors, and that if the stock issued to Ball & Company had nobeen voted upon, the result of the election would have been in no wise altered.

A further exception is taken to the sufficiency of the answer as a ground for dissolving the injunction, because itdenial of the insolvency of the company at the time charges in the declaration, is not sufficiently specific and unequivocal The bill charges that the consolidated Franklinite Companbecame insolvent and unable to pay its debts, prior to th first of August, 1861. And the defendants are interrogated whether the said company was not insolvent on and beforthe first of August, 1861, and whether it has not continueinsolvent since that time, and whether the said company has not been declared insolvent by the Court of Chancery of this The note in question bears date on the 26th of Apri. 1861, and matured prior to the first of August. The bill thave the company declared insolvent was exhibited in this court, and an injunction restraining the further exercise b; the company of its corporate powers was issued, on the 6th o

February, 1863, eighteen months after the maturity of the note.

It is worthy of notice that the bill does not charge that the company was insolvent when the note was given, or that it was made to defraud the creditors of the company, or to gain any undue advantage in the distribution of its assets. The facts of the case negative any such idea. The sole ground of relief is that the note was fraudulent and without consideration, and made with the fraudulent intent of clandestinely selling the property of the company, and buying it the melves, without consideration, in fraud of creditors and the stockholders of the company.

All that is charged is, that the company was insolvent and 80 Continued from and after the 1st of August, 1861, the day on which the suit upon the note is alleged to have been in-But that constitutes no ground of relief. mere fact that the company was insolvent does not, of itself, render invalid or fraudulent a note given, or judgment confessed by them, for a bona fide debt. For eighteen months afterwards, neither the creditors nor stockholders of the com-Pany took any measures to have the company declared incolvent, or to obtain the interference of this court. If, in the mean time, the holders of the note have by their proceedings at law, acquired a lien upon the property of the company and ⁸ Priority over other creditors in the distribution of its assets, there is no good ground for disturbing such priority. If they have not acquired such lien, their proceeding to final judgment at law will affect no equitable right of other creditors, if such there be.

The injunction is dissolved.

Leve Helmes et al.

HENRY M. Low 19. LAWRENCE HOLMES and JOSEPH CROWELL.

- 1. Encombrancers are not necessary parties to a bill for partition.
- 2. Upon a bill for partition of chaitels by a tenant against his co-tent and to restrain him from removing or using the same, or committing a waste thereon, the claim of a third party upon the property by way morngage, can not be established by affiliation opposition to the claim the bill upon a preliminary application for an injunction. The alle fact constitutes no valid objection to the granting of the injunction.
- 3. Upon a bill for partition by one tenant in common against anothwhere the facts constitute a clear case of the use and enjoyment of property to the entire exclusion of the complainant, a receiver will appropried. A receiver will not be appointed however, when the appointed will subject the co-tenant to inconvenience and expense, with corresponding benefit to the complainant and such co-tenant will give complainant security for the r-ms and profits.
- 4 Order that the defendant, within ten days from the service of the complainant to account and pay over one half the value of the rents and profits of the properant on failure thereof that an injunction issue to restrain the further of the property, and that a receiver be appointed.

The bill alleges that the complainant is the owner of one equal, undivided, half part of certain goods and ch tels, consisting of a steam engine, printing press, type, a other articles, the materials of a printing office establi ment, of which Holmes is the owner of the other undivihalf, and that Crowell, the other defendant, claims some terest, the character of which is unknown to the comple ant; that Holmes is in the possession and enjoyment of property, and that he refuses to divide it, or to sell and vide the proceeds. The bill prays that the property may divided, or that it may be sold and the proceeds divide that an account may be taken of the rents and profits, the complainant's interest therein secured to him, and t in the mean time, the defendants may be restrained fi committing any waste or destruction of the property, or moving the same out of the state, and from using the sar and that a receiver may be appointed.

A rule to show cause was granted why an injunction should not issue, and a receiver be appointed. The case was heard upon the argument of the rule.

Mr. A. B. Woodruff, for the complainant, in support of the rule.

As to receiver, the question resolves itself into this, whether a receiver should be appointed. Edwards on Receivers, 2, 3, 5.

Rights of third persons will not be prejudiced. Ibid. 11

Whether a mortgagee be in or out of possession, receiver will be appointed. Ibid. 54-5-6.

Receiver should be appointed, and injunction granted reatraining use.

Mr. Runyon, for defendant, Lawrence Holmes, contra.

It is impracticable for the court to make partition. Injunction and receiver are but ancillary. The appointment of a receiver is a high power, which will be cautiously exercised.

The proper parties are not before the court. Sears' executors should be parties. They have a lien on Hoe's press to \$245.75.

The defendant has equal right to possession with the complication. Where parties have equal right to possession, upon a mere application for partition, the court will not take the property from the possession of the party who has it.

I admit right to have partition of property, when either learly elects to do so. Partnership need continue no longer than party elects. So, in regard to all things held by tenants in common. Wilson v. Reed, 3 Johns. R. 175; Nowlen Colt, 6 Hill 461.

Holmes has a right to an equal undivided half of every article in the office. He has a right to possession.

The Court is not asked to condemn any one, but simply to divide. It will reductantly stop business by injunction, or by appointment of a receiver. Spratt v. Ahearne, 1 Jones

(Irish Exch.) 50; Tyson v. Fairclough, 2 Sim. & Stu. 144 – Right to appointment of receiver doubted in last case = even in case of exclusion. Milbank v. Revett, 2 Mer. 405 – No exclusion, or pretence of exclusion, in this case.

Receiver refused, but defendant required to give security— Street v. Anderton, 4 Bro. Ch. Cas. 414.

If there were threatened waste, it would be proper to enjoin. Hole v. Thomas, 7 Vesey 589.

THE CHANCELLOR. The only question now before the court, is the complainant's right to an injunction and a receiver. The equity of the complainant's bill, and his right to the enjoyment of his share of the property, are not drawm in question.

I. It is objected, that there are other encumbrances or claims upon the property, and that the necessary parties are not before the court. But encumbrances upon the property constitute no objection to a partition. As regards real estate, it is not necessary that the encumbrancer should be a party to the suit for partition. His rights are not affected by it. And in case of a division or sale of chattels, the court will see that the rights of mortgagees are protected. So far as the case appears by the bill, Crowell is the only other party having a claim upon the property. fore the court. The affidavits read upon the hearing, tend to show that the executors of Sears have also a claim upon the property by way of mortgage. That fact can not be established by affidavit in opposition to the claim of the bill, upon a preliminary application for an injunction. If by the defendant's answer, or otherwise in the progress of the cause, the existence of the encumbrance shall be established, the encumbrancer may be made a party, and his rights pro-As the case now stands, the fact alleged constitutes tected. no valid objection to the granting of an injunction.

II. It is objected, that a receiver will not be appointed on a bill filed for partition by one tenant in common against

another, unless a case of exclusion of the complainant from the enjoyment of the premises is shown. In support of this principle, counsel relies upon the cases of Spratt v. Ahearne, 1 Jones (Irish Exch.) 50; Milbank v. Revett, 2 Mer. 405.

The principle established by the cases is, that the court will not wrest from the defendant his share of the property, to the enjoyment of which he is legally entitled, unless it be necessary in order to secure to the complainant the enjoyment of his rights. If, therefore, it does not appear that the complainant is by the act of the defendant, excluded from the enjoyment of his share of the property, there is no ground for the exercise of the extraordinary power of the ourt, either by enjoining the defendant in the use of the property, or by putting it under the control of a receiver. And upon the same principle the court will not, from the mere fact that a tenant in common is in possession of the land, subject him to the payment of rents. In other words, a tenant in common, who voluntarily declines to enter into Possession of the premises owned in common, cannot subject the tenant in possession to the payment of rent against his will, unless it appears that he has the entire or exclusive use of the property. The soundness of the principle is admitted, but it admits of no application to the facts of this case. The property in question is the machinery and material of a printing office, of which the defendant has the exclusive possession. It is used by him in the printing of a daily paper issued by the defendant. The complainant is not a partner. He has no interest or concern in the establishment, other than as the owner of an undivided half of the materials. The defendant being in the sole possession, use, and enjoyment, refuses to divide, or to sell it and give the complainant his share. The facts constitute a clear case of the use and enjoyment of the property by one tenant, to the entire exclusion of his co-tenant.

III. It is objected, that the defendant, being entitled to an equal undivided half of the property, and having an equal

right with the complainant to its use and enjoyment, the court will not, in the absence of a wrong committed or meditated, deprive him of the use and enjoyment of his own property. That one tenant in common has as good right to the enjoyment of the property as the other, and that no action at law can be maintained by one against the other for the recovery of the property while the joint ownership continues.

The principle upon which a court of equity acts, I think, is this, that it will not, at the instance of one tenant in common, deprive the other tenant of the use and enjoyment of the property, further than is necessary to protect the just rights of the complainant. The court acts upon this principle in regard to partnership property. Upon the dissolution of the partnership, a receiver will not be appointed, nor one of the partners deprived of the management of the business, at the instance of the co-partner, unless it be necessary to protect the interest of the complainant. Cox v. Peters, 2 Beas. 39.

The bill in this case seeks a division of the property, and an account of the rents and profits. The defendant is in the lawful possession of the property, using it in a legitimate way in the prosecution of his ordinary business. should it be wrested from his hands and placed in the hands of a receiver? It must deprive him, to some extent at least, of the control and management of his business, and subject him to expense without any corresponding benefit to the complainant. All that the complainant can fairly require, is security for the rent of the property, including compensation for its deterioration or destruction by use. Upon the facts charged in the bill, this is clearly necessary for the protection of the complainant's rights. And it is proper to require it when the appointment of a receiver is denied. Street v. Anderton, 4 Bro. Chan. R. 414. If this security is given, there is no necessity for a receiver.

Executors of Vanness v. Jacobus et al.

So far as it is sought to restrain the defendant from waste or destruction of the goods, or removing them out of the jurisdiction of the court, the injunction is granted.

It will be ordered, that the defendant, Holmes, within ten days from the service of a copy of the order, give bond, with security, to the complainant, to account for and pay over the one half of the value of the rents and profits of the property, the bond to be approved by one of the special masters of the court; and on failure of the defendant to give such bond, then that an injunction issue to restrain him from the further use of the property, and that a receiver be appointed.

EXECUTORS OF EVERT H. VANNESS vs. ISAAC JACOBUS and others.

- 1. It is only where there is a reasonable question or doubt, that a trustee is entitled to come into court to have that question determined.
- 2. Where, by the residuary clause of his will, after numerous specific devises of portions of his real estate, a testator directs all the residue of his estate, both real and personal, to be divided into equal shares or parts, which he gives and bequeathes to his children and grandchildren, it is fairly to be inferred that the testator designed that the entire residue, real as well as personal, should be sold, and the proceeds distributed among the residuary legatees.
- 3. A direction by the will, to divide the residue of the testator's lands will not be constructed technically as a devise, where the testator has expressly directed the executors to sell the lands not devised.

The bill in this cause was filed to settle the construction of the will of Evert H. Vanness, deceased, and for directions to the executors.

- Mr. C. Parker, for complainants.
- Mr. C. H. Scharff, for defendant.

Executors of Vanness v. Jacobus et al.

THE CHANCELLOR. The complainants having made sale of certain lands of which their testator died seized, a question is raised as to their power under the will to sell and convey the real estate. The court is asked to settle the true construction of the will, and to give direction as to the course to be pursued by the executors.

The case appears so clear, that had not the power of the executors to make the sale been denied by counsel, I should have regarded the application to the court as unnecessary and unwarranted. It is only where there is a reasonable question or doubt, that the trustee is entitled to come to the court to have that question determined. Merlin v. Blagrave, 25 Beav. 139.

The testator by his will gives several pecuniary legacies, and makes numerous specific devises of portions of his real estate.

By the residuary clause, he directs all the residue of his estate, both real and personal, to be divided into eight equal shares or parts, which he gives and bequeathes to his children and grandchildren. From the language of the residuary clause, it is fairly to be inferred that the testator designed that the entire residue of his real and personal estate should be sold by his executors, reduced to a common fund, divided into equal shares, and distributed by his executors as legacies among his children and grandchildren. The whole residue is to be divided into equal shares, which shares he gives and bequeathes to the legatees named. It is worthy of notice, that throughout the will the phrase "give and bequeathe" is uniformly applied to a bequest of personal property, and "give and devise" to a disposition of real estate. The testator contemplated the conversion of the entire residue into personalty, and a distribution of it by his executors among the residuary legatees.

But if this be not a necessary implication, and if any doubt exist as to the construction of the will, it is effectually removed by the codicil, which is as follows: "and whereas in said will no authority was given to my executors to sell

Executors of Vanness v. Jacobus et al.

ny of my lands and real estate, but the same is ordered to be divided, now it is my will that my executors sell and dispose of all my lands and real estate, not devised in said will, and make good and sufficient deeds for the same, and livide the moneys received therefrom into eight equal parts or shares, as is directed in the eleventh section of my said will." It is objected that this clause confers no power to sell the lands, which by the eleventh or residuary clause of the will are ordered to be divided, because the order to divide operates technically as a devise, and the beneficiaries take as devisees under the will. Inasmuch, therefore, as the codicil confers only the power of selling lands not devised, it is inoperative as to those lands.

But this construction violates the most familiar and fundamental rules of interpretation.

- 1. It renders the clause totally nugatory. The whole of the testator's lands, other than those specifically devised, were covered by the residuary clause. If the codicil does not apply to those lands, it is unmeaning.
- 2. It regards the technical meaning of the terms, in total disregard of the sense in which the testator used them. It is obvious that the testator distinguished between the lands devised, and the lands ordered to be divided. The latter, not the former, he ordered to be sold. The codicil is in effect a declaration by the testator of the true meaning of the residuary clause of the will. He intended not that the lands should be divided, but that the lands should be sold and the proceeds divided.

Decree accordingly.

- GEORGE W. MELICK, an infant, by his next friend, John C. Felmly, vs. Peter W. Melick, executor of Tunis Melick, deceased.
- 1. Where a bill is defective for want of proper parties, the appropriate remedy is a demurrer, or an objection at the hearing for want of parties, and not a petition to be admitted to defend the suit.
- 2. The residuary legatee is not a necessary party to a bill filed by a legatee or creditor to establish a claim against the estate of a testator; the executor alone is to be made defendant. He is the legal representative of the rights of the residuary legatee, and it is his duty to see them properly defended.
- 3. Where a bill is exhibited against an executor, involving the interests of the residuary legatee, and the executor is disqualified by his situation from representing the interests and protecting the rights of the legatee, he will be admitted to defend the bill in person. No answer or decree being sought against the legatee, the bill need not be amended to make him formally a defendant.
- 4. Complainant allowed ten days to amend his bill, by making the residuary legatee a defendant, if he so elect; otherwise, leave given to the legatee, within thirty days thereafter, to appear and answer the bill in its present form.

The bill is filed to recover a donation causa mortis, alleged to have been made by the defendant's testator, Tunis Melick, to the complainant. Susan Trimmer, a daughter of the testator and his residuary legatee, by her petition, asks to be admitted to defend the suit.

Mr. B. Vansyckel, for petitioner.

Mr. E. T. Green, for complainant, contra.

Cases cited by petitioner's counsel. Pence v. Pence, 2 Beas. 257; 1 Daniell's Ch. Pr. 301; Wilkinson v. Perrin, 7 Monroe 217; Pritchard v. Hicks, 1 Paige 270; Story's Eq. Pl., § 140; Ibid., § 150.

Cases cited by complainant's counsel.

As to who are proper parties. 1 Daniell's Ch. Pr. 342; Story's Eq. Pl., § 231; Williams v. Russell, 19 Pick. 162; Wych v. Meal, 3 P. W. 310, note 1; Kerr v. Watts, 6 Wheaton 550; Snellgrove v. Baily, 3 Atk. 214; Ward v. Turner, 2 Vesey, sen., 431; Tate v. Hilbert, 4 Bro. Ch. Cas. 286; Griffith v. Bateman, Finch 334; Calvert on Parties 20, 21; Mitford's Eq. Pl. 135; Anon., 1 Vernon 261; Newland v. Champion, 1 Vesey, sen., 106; Lawson v. Barker, 1 Bro. Ch. Cas. 303; 2 Peters' S. C. R. 370; Wainwright v. Waterman, 1 Vesey 311; Brown v. Dowthwaite, 1 Madd. Ch. R. 242; Hallett v. Hallett, 2 Paige 15; West v. Randall, 2 Mason 181; Lyon v. Tallmadge, 1 Johns. Ch. R. 187; Sedgwick v. Cleveland, 7 Paige 287; Cromer v. Pinckney, 3 Barb. Ch. R. 466.

Residuary legatee cannot be made a party on petition. 3 Daniell's Ch. Pr. 1663; Carow v. Mowatt, 1 Edw. Ch. R. 9; Foster v. Deacon, 6 Madd. Ch. R. 59; Ball v. Tunnard, Ibid. 275; Watts v. Crawford, 11 Paige 470; Bozon v. Bolland, 1 Russ. & Mylne 69; Sedgwick v. Cleveland, 7 Paige 287; Porter v. Cox, 5 Madd. Ch. R. 80.

THE CHANCELLOR. The admitted facts of the case, as they appear upon the face of the bill and by the petition are, that the complainant is an infant of very tender years, that he is a son of the defendant, who is the sole executor of the testator's estate, and to whom the donation is alleged to have been made for the benefit of the complainant, and that the petitioner is the sole residuary legatee under the will of the testator.

The bill is not defective for want of proper parties. If it were so, a demurrer, or an objection at the hearing for want of parties, would be the appropriate remedy. It is well settled, that upon a bill filed by a legatee or creditor to establish a claim against the estate of a testator, the executor alone is to be made a defendant. The residuary legatee is not a necessary party. Mitford's Eq. Pl., by Jeremy, 170—

171; 1 Daniell's Chan. Prac. 301; Story's Eq. Pl., § 140; Calvert on Parties 20.

The executor is the person constituted by law to represent the personal property of the testator, and to answer all demands upon it. He is the regular representative of all persons interested in the personal assets, who are bound by his bona fide acts, as far as third persons are concerned. Story's Eq. Pl., § 141; Mitford's Eq. Pl. 165.

The executor is the legal representative of the rights of the residuary legatees, and it is his duty to see them properly defended. *Pritchard* v. *Hicks*, 1 *Paige* 273.

The petitioner admits that the residuary legatee is not a necessary party to the bill, but insists that under the special circumstances of the case, the executor is not qualified to represent her interests. It is evident that the residuary legatee has a direct interest in the event of the suit. is in fact, the only party beneficially interested in the subject matter of the controversy, adversely to the claim of the The complainant is an infant child of the complainant. executor, and is under his legal control and guardianship. The donation is charged to have been made to the father for the benefit of his infant child. The bill charges that the executor does not deny its material allegations. The legal presumption is that the suit was instituted with the approbation of the father, if not, as the petition alleges, by his procurement. It is fair to presume, therefore, that he will neither dispute the facts upon which the complainant's claim rests, nor interpose any legal objection to the recovery of his He does not stand in a position to represent the interests and protect the rights of the residuary legatee. point of fact he has filed no answer to the complainant's bill, and has left the suit entirely undefended.

It is obviously proper, under such circumstances, that the residuary legatee should have an opportunity of defending her rights. She is ordinarily not a necessary party to the suit, because the law presumes that her interests will be represented and her rights protected by the executor. If he is

not in a situation to represent her interests fairly, and to make a full defence to the extent of her rights, she should not be compelled to rely upon his aid. A trustee will not be permitted to represent his cestuis que trust where their interests conflict.

A lunatic ordinarily sues only by his committee or guardian. But if the guardian has an interest adverse to that of the lunatic, he may sue by the attorney general, or by next friend specially appointed by the court. Snell v. Hyat, 1 Dick. R. 287; Mitford's Eq. Pl., by Jeremy, 104; Story's Eq. Pl., § 64, note 2.

Though the executor in this case has no pecuniary interest of his own involved in the litigation, yet it is obvious that his feelings and inclinations as a father, and probably his sense of duty as an executor, may lean as strongly as his own personal interests would do, against the claim of the defendant.

The residuary legatee asks that she may be admitted in person to defend the rights which, in ordinary cases, the law entrusts to the care of the executor, on the ground that the executor is disqualified by his situation from discharging his duty in that behalf. She is clearly entitled to that privilege. It would be a reproach to the administration of justice, if the law were otherwise. It is the constant practice in courts of law, to permit the party beneficially interested to conduct or defend a suit in the name of the party to the record who has the legal right, and to prevent all interference by the latter with the just rights of the former. Welch v. Mandeville, 1 Wheaton 233; Sloan v. Sommers, 2 Green's R. 510.

In arriving at this conclusion, I lay out of view all charges of fraud meditated or practiced by the executor. I assume that the course pursued by him in the conduct of the suit has been adopted in good faith, and prompted by fair and honest motives. It is enough that the suit is undefended, that the petitioner is entitled to a full and fair defence, and

that the executor is not in a situation to conduct that defence, as the interests of the petitioner require.

The mode in which the legatee is admitted to defend is not material, provided the rights of all parties are properly She cannot, with propriety, be admitted to de-The complainant is enfend in the name of the executor. titled to the benefit of an answer from the executor, and to the admission of all the facts within his knowledge. executor owes a duty, moreover, to all parties interested in the personal estate, which he is authorized and required to discharge in consistency with his own views of right. the other hand, the petitioner, as has been said, is clearly not a necessary party to the bill. No discovery is sought from, nor is any decree asked or needed against her. decree against the executor, will be as conclusive and effectual as if the residuary legatee was a party. If the complainant were seeking an answer from, or a decree against the petitioner, clearly the bill must be amended in order to make the party formally a defendant. Andrews v. Solomon, Peters' C. C. Rep. 356. But as the petitioner simply asks to be admitted to defend the suit in its present form, the ends of justice will be answered by admitting her to appear and make defence, without an amendment of the bill.

Unless the complainant elect, within ten days, to amend his bill by making the residuary legatee a defendant, the legatee will be permitted, within thirty days thereafter, to appear and answer the bill in its present form, or make such equitable defence to the action as she may be advised.

Order accordingly.

MARGARET YOUNG vs. STEPHEN YOUNG, JOHN WELLS, and others.

- An agreement by the complainant with the mortgagor, in a suit for foreclosure, his claim and costs having been paid in full, that the suit shall be no further prosecuted, binds the complainant only.
- 2. A defendant who has been allowed to proceed with the suit in the complainant's name, under Rule XIV, § 9, may enforce the payment of his demand by means of such suit, though the complainant's debt be paid in full or he have given the mortgagor further time.
- 3. Where an answer is filed, to which there is neither exception nor replication, the cause should be set down for hearing upon bill and answer; and a decree pro confesso and order of reference cannot be taken except by consent of the defendant. But where the cause is conducted and the decree taken at the instance of the defendant who has answered, his entering the decree is a waiver of his rights and a consent to the decree.
- 4. Full costs will not be allowed a mortgagee upon his answer spun out by long recitals from the bill touching other encumbrances, for the mere purpose of admissions.

Mr. Leport, for Stephen Young, in support of the motion.

Mr. E. W. Scudder, for John Wells, one of the defendants, contra.

THE CHANCELLOR. The complainant having filed a fore-closure bill and made other encumbrancers parties, refused to proceed and suffered a term to be lost. Thereupon one of the defendants who had come in and answered, took an order upon the complainant to proceed; and upon her failure to do so, the defendant was allowed to proceed with the suit in complainant's name, pursuant to Rule XIV, § 9, (Rules, p. 35.)

A decree pro confesso having, in the further prosecution of the suit, been taken against the mortgagor and another defendant in the cause who had not answered, the mortgagor now asks that the decree be set aside and the complainant's bill dismissed.

The application to dismiss the bill must have been made,

either under a mistake of fact, or a total misapprehension of the rule of practice. On the 6th of October, 1863, and before the time for answering had expired, Wells, one of the defendants, filed his answer. On the 27th of October, 1863, the mortgagor paid the complainant's claim and costs in full, and received from her solicitor a stipulation that the suit should be no further prosecuted. He subsequently offered to pay to Wells, the defendant, the amount of his mortgage debt, but refusing to pay his costs, the money was not accepted, and the defendant was thereafter authorized to proceed with the suit.

It seems to have been supposed that a court of equity would not suffer the suit to be proceeded with in direct violation of the complainant's agreement, either by the com-This is true, plainant, or by any other party in his name. so far as relates to the complainant's own demand. But the design and operation of the rule is to prevent any arrangement between the complainant and the mortgagor, operating to delay or defeat the suit to the prejudice of other encumbrancers, who have appeared and answered. Prior to the adoption of the rule, if the progress of the suit was delayed or arrested by any arrangement between the complainant and the mortgagor, the only remedy of the other encumbrancers who were made defendants, would have been to dismiss the complainant's bill, and institute new proceedings in their To avoid this inconvenience and delay, whenown name. ever a complainant from any cause refuses to proceed, the rule authorizes an encumbrancer who has answered, to proceed with the cause to decree and execution in the name of the complainant. No act or agreement of the complainant can interfere with the exercise of this right by the defendant. The complainant's debt may be paid in full, or he may stipulate to give further time to the mortgagor; and the defendant who has answered, may nevertheless enforce the payment of his demand, by means of the suit instituted by the complainant.

But it is insisted, that if the defendant was authorized to

proceed, the decree pro confesso is irregular, because no rule to show cause, or other notice of the proceeding, was served upon the mortgagor. The rule, without prescribing how the suit shall be proceeded in, simply authorizes the defendant to proceed with the cause to decree and execution in the complainant's name. It transfers the conduct of the suit to the defendant, substituting him in the place of the complainant for that purpose. In the absence of any express provision to the contrary, it must leave him subject to the same rules in the conduct of the suit, that the complainant himself would have been, if he had proceeded with the cause. By Rule XIV, § 8 (Rules, p 35), the complainant, who omits to take a decree pro confesso before the expiration of the term next after the time has elapsed when he is entitled to it, is prohibited from moving such decree until he has served upon the defendant an order to answer, except in cases where the time for final decree in the same cause against other defendants shall not have arrived. This case falls within the exception. The time for final decree against the defendant who had answered, had not arrived. The complainant, therefore, by the terms of the rule, would not have been bound to rule the defendant to answer before taking a decree pro confesso. The decree therefore was taken in strict pursuance of the rule, and in compliance with the practice of the court.

It might seem at first view, where a complainant refuses further to prosecute his claim, that the fair presumption is that the claim is satisfied, or the right to prosecute waived, and that before another party should be permitted to prosecute the suit, the defendant should have an opportunity of showing cause against it. But the answer is that a payment of the complainant's demand, or a stipulation by him not to prosecute the suit, is no objection to the prosecution of the suit by another encumbrancer for his own benefit. If, in the further progress of the suit, any surprise is occasioned or injustice done to the mortgagor, that would afford distinct ground for relief. But there is here no complaint of surprise or wrong. The only objection is that the proceeding

was irregular, and the sole inquiry is whether the decree was entered in violation of the rules or practice of the court.

The decree is apparently open to another objection, viz. that instead of proceeding to a decree, the cause should have been set down for hearing upon the answer. When an answer is filed to which there is neither exception nor replication, the cause should be set down for hearing upon bill and answer, and a decree pro confesso and order of reference cannot be taken except by consent of the defendant. Nix. Dig. 99, § 28; Wright v. McKean, 2 Beas. 259.

But here the cause is conducted and the decree taken, at the instance of the defendant who has answered. It was his right to have the cause set down for hearing. He may waive that right and consent to a decree. He has done so by causing the decree to be entered. A written consent by the defendant who has answered to the entry of the decree is sometimes filed, but it cannot be necessary where the defendant himself is the actor. His consent is a necessary inference.

There is nothing in the objections urged against the validity or regularity of the decree. The motion of the defendant must therefore be denied, and the rule to show cause discharged.

The whole controversy has grown out of a difference between the solicitors of the parties, in regard to the right of the mortgagee who has answered, to receive costs. The entire mortgage debt has been paid by the mortgagor into the hands of his solicitor, who proffers himself ready and willing to pay as soon as the right is settled. The parties have already been subjected to unnecessary expense, and it is proper that such direction be now given, as shall render further controversy unnecessary.

There is a decree pro confesso in favor of the complainant upon his mortgage. The master, by the order of reference, was directed to ascertain and report the amount due upon that mortgage. He has not done so, but has simply reported

Force v. Dutcher et al.

that the mortgage was not produced before him. That amounts to nothing by way of defence to the claim. The decree establishes the complainant's right to recover upon the mortgage. Her failure to proceed with the suit does not extinguish the right, or deprive her of the lien of the encumbrance, although the mortgage was not produced before the master. The evidence before the master clearly showed that the amount due to the complainant upon her mortgage had been fully paid and satisfied since the filing of the bill of complaint. It is due to the mortgagor that that fact should distinctly appear upon the record. If the cause should proceed to a final decree, this omission in the report must be supplied.

Before proceeding to final decree, an opportunity should be afforded to the mortgagor of paying the debt and costs. Ten days from the date of this order will be allowed for that purpose, before the cause is further proceeded with. If the debt and costs are paid, the clerk, in the taxation of costs, will allow for twelve folios only in the defendant's answer. It is unnecessary and improper in a mortgagee, while setting up his own mortgage, to spin out his answer by long recitals from the bill touching other encumbrances, for the mere purpose of admissions. It serves no purpose but to encumber the files of the office and increase costs.

WILLIAM M. Force vs. Andrew Dutcher and others.

- 1. Upon the completion of a contract for the sale of real estate, the vendor is deemed in equity, a trustee for the purchaser of the land sold.
- 2. Where a party has contracted for the purchase of real estate, and subsequently consents to a sale thereof by the agent of the vendor, upon the assurance that he shall receive a specified sum therefor, the estate of the vendor is liable in equity for the value of the land to which the purchaser was equitably entitled.
- 3. Upon the final hearing, the material charges of the bill must be taken as true.

Force v. Dutcher et al.

Mr. Vanatta, for complainant.

Mr. Beasley, for defendants.

THE CHANCELLOR. The bill alleges, that on the 11th of October, 1856, the complainant purchased of William E. Hunt, through his agent, Andrew Dutcher, twenty-two acres of land for \$7000, and that he paid \$1000 on account of the purchase money; the deed to be ready within one week.

The complainant having contracted for the sale of eleven acres of the tract thus purchased, for \$5000, consented, at the request of the agent, that the deed should be made directly from Hunt to the purchaser, on condition that the \$5000 should be applied in part payment of the \$7000 agreed to be paid by the complainant for the entire tract. The deed was executed, and the purchase money applied accordingly, leaving \$1000 due from the complainant to Hunt for the purchase of the twenty-two acres.

In the year 1859, the legal title to eleven acres of the land agreed to be conveyed to the complainant still remaining in Hunt, Dutcher, as the agent of Hunt, agreed to sell and convey to a third party a tract of thirty acres and seventeen hundredths of land, including the eleven acres agreed to be conveyed to the complainant, for the consideration of The complainant consented to this sale, upon the \$10,000. assurance that he should receive for the eleven acres which he had previously purchased from Hunt, \$400 per acre. pursuance of this arrangement, a deed, bearing date on the 20th of April, 1859, was executed by Hunt for the thirty and seventeen hundredths acres, for the consideration of The bill alleges that the eleven \$10,000 paid therefor. acres of the complainant were more valuable than the residue of the tract, and were worth at least \$4400, which it was stipulated the complainant should receive.

The bill claims that the complainant is entitled to recover \$3400, with interest; \$1000 being first applied in satisfaction of the purchase money agreed to be paid by him for the twenty-two acres.

Force v. Dutcher et al.

To this bill the defendants demur for want of equity. The elemurrer is attempted to be sustained, on the ground that, upon the case made by the bill, Dutcher was the agent of the complainant, and in that capacity received for him on the sale of the land in question, a definite sum of money which he refuses to pay over; that the complainant's remedy is an action of *indebitatus assumpsit* for money had and received.

This, as it appears to me, is not an accurate statement of the case made by the bill. The legal title to the land in question was in Hunt, not in the complainant. The complainant consented that the land might be sold and conveyed by Hunt in connection with other lands, upon the assurance that the complainant should receive for the portion of the land to which he was equitably entitled, at the rate of \$400 per acre. The land was conveyed by Hunt as his own property. The purchase money was payable to him. The agent alleges that it still remains in the hands of his executors. It is difficult to perceive upon what ground the agent can be liable for money had and received, whatever his liability may be upon this contract.

The case made by the bill is briefly this. Hunt was under contract to convey to the complainant eleven acres of land. Instead of conveying it to the complainant, Hunt sold and conveyed the land, in connection with other land of his own, to a third party, and received the price, either by himself or by his agent. The complainant assented to that sale and conveyance, upon the assurance that he should receive for his portion of the land sold at the rate of \$400 by the acre. The land has been sold and the purchase money is in the hands, either of the agent of the vendor, or of the executors The agent denies that he has the money. of his estate. The executors of the vendor deny that they have it. complainant seeks to discover in whose hands the money is; and a decree for payment against the party holding it. Admit that the vendor had no knowledge of the contract made by his agent with the complainant, or that so far as regards

Force v. Dutcher et al.

that transaction, Dutcher was not acting as the agent of the vendor; still the estate of the vendor would be liable, in equity, for the value of the land to which the complainant was equitably entitled.

Upon the completion of a contract for the sale of real estate, the vendor is deemed, in equity, a trustee for the purchaser of the land sold. Crawford v. Bertholf, Saxton 469; Hoagland v. Latourette, 1 Green's Ch. R. 254; 2 Story's Eq. Jur., § 1212; 1 Sugden on Vendors, chap. 4, sec. 1.

Upon this hearing, the material charges of the bill must be taken as true.

The demurrer is overruled.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW JERSEY,

OCTOBER TERM, 1864.

ALFRED B. SEYMOUR vs. THE LONG DOCK COMPANY.

- 1. Before issue joined, where the pleadings on file have not been sworn to, amendments to the bill are permitted as the purposes of the party may require.
- 2. After issue joined and before the taking of testimony, the complainant will be permitted to withdraw his replication and amend his bill as his case may require. But after witnesses have been examined, the time for allowing amendments, except the addition of defendants, or such as do not substantially alter the case, has passed.
- 3. After the taking of testimony, if there be an imperfection in the frame of the bill, if the case as stated is insufficient to warrant the relief prayed for or to ground a complete decree, if some other point seems accessary to be made, or some additional discovery is found requisite, the complainant must resort to a supplemental bill.
- 4. If the bill is defective for want of parties, the complainant will be permitted to amend by adding the proper parties. So leave will be given at the hearing to amend, when a matter has not been put in issue by the bill with sufficient precision; also, to amend the prayer for relief, or any clerical mistake or mis-statement.
 - 5. After general demurrer for want of equity, amendments are granted only where there is some defect as to parties, or some omission or mistake

VOL. II.

P

of a fact or circumstance connected with the substance of the case, but not forming the substance itself.

- 6. Where, upon the final hearing, or even after appeal, it appear clearly from the evidence, that the complainant has a case which entitles him to relief, but which, by reason of some defect or omission in the charges or allegations of the bill, is not brought fairly within the issue, he will be permitted to adapt the allegations of the bill to the case as proven. Such amendment however will only be allowed after the testimony is closed.
- 7. Where the proposed amendments would change the issue, or introduce new issues, or materially vary the grounds of relief, they must be introduced by supplemental bill.
- 8. The allowance of amendments after issue joined, is a matter of indulgence to be granted in the discretion of the court.

This case came before the court upon a motion to amend the bill as filed, by adapting the allegations with greater precision to the facts already proved. A large mass of testimony had been taken, and the evidence was still in progress.

Mr. Gilchrist, for complainant, in support of the motion. We ask to amend the bill without prejudice to the evidence already taken. Such amendment will be allowed. Cooper v. Ricardo, 2 Seaton on Decrees 1253; Champneys v. Buchan, 3 Drewry 5; Story's Eq. Pl., § 891.

Amendments will be allowed to present the complainant's claim with more precision upon facts already proved. 1 Hoffman's Ch. Pr. 284, 304; Willis v. Evans, 2 Ball & B. 225; 1 Newland's Ch. Pr. 197; Hill v. Beach, 1 Beas. 31, 35, 41; Davison v. Davison, 2 Beas. 252; Andrews v. Farnham, 2 Stockt. 91; Mavor v. Dry, 2 Sim. & Stu. 113.

Mr. A. O. Zabriskie, for defendants, contra.

THE CHANCELLOR. The cause being at issue, and evidence having been taken on both sides, the complainant moved to amend his bill without prejudice to the evidence already taken.

The question presented is whether the amendments proposed are proper to be made at this stage of the proceedings.

Before the pleadings are brought to a termination, that is before the issue is finally made up between the parties, amendments, where the pleadings on file have not been sworn to, are permitted with the utmost liberality, as the purposes of the party may require. The complainant may vary his case by amendment in any way he pleases, however inconsistent with or repugnant to the original bill. A bill to set aside a deed has been permitted by amendment to be made a bill to establish the deed. A bill to invalidate the encumbrance of a mortgage has been converted into a bill to redeem the mortgage. Mitford's Pl. (by Jeremy) 324; Mavor v. Dry, 2 Sim. & Stu. 113; Buckley v. Corse, Saxton 510; 1 Hoffman's Ch. Pr. 304.

At this stage of the proceedings, it was remarked by the Chancellor, in Buckley v. Corse, it is difficult to draw a line beyond which the complainant may not pass in changing his case. And it seems absolutely essential to the ends of justice that this extreme degree of indulgence should be allowed, for from the character of the proceedings, the merits of the complainant's case are not unfrequently disclosed by the answer.

And even after issue joined, and before the taking of testimony, the complainant will be permitted to withdraw his replication and amend his bill, as his case may require. Champneys v. Buchan, 3 Drewry 5; 1 Hoffman's Ch. Pr. 286.

But after witnesses have been examined, the time for allowing amendments, except the addition of defendants or such as do not substantially alter the case, has gone by. Gresley's Eq. Ev. 23; Mitford's Pl. (by Jeremy) 325, 55; 1 Hoffman's Ch. Pr. 284, 393; Shephard v. Merril, 3 Johns. Ch. R. 423; Thorn v. Germand, 4 Johns. Ch. R. 363; Goodwin v. Goodwin, 3 Atk. 370; Stafford v. Howlett, 1 Paige 200.

From this time, if there be an imperfection in the frame of the bill, if the case as stated is insufficient to warrant the relief sought for or to ground a complete decree, if some other point appears necessary to be made, or some addi-

tional discovery is found requisite, the complainant must resort to a supplemental bill. The time for amendment has passed. Mitford's Pl. (by Jeremy) 55, 326; Story's Eq. Pl., § 888, 891; 1 Hoffman's Ch. Pr. 393; Shephard v. Merri, 3 John. Ch. 423.

This is not a mere arbitrary rule, but rests upon clear and familiar principle, and is a valuable safeguard of the rights of parties. The evidence must be confined to the issue. The allegations and proofs must correspond. To prove a charge not made by the bill, and to make a charge not sustained by proof, are alike inoperative to sustain a decree. In one case there is no evidence; in the other it is rejected as impertinent. The complainant fails alike in both cases for want of proof.

As already stated, it is a recognized exception to the general rule, that if the bill is defective for want of parties, the complainant will be permitted to amend by adding the proper parties. So when a matter has not been put in issue by the bill with sufficient precision, the court, upon the hearing, has given leave to amend. So the complainant will be permitted, upon the hearing, to amend his prayer for relief, or any clerical mistake or mis-statement. But neither of these amendments vary the issue between the parties, nor as a general rule do they at all affect the relevancy of the evidence offered.

But except in the case of infants, who are permitted to amend without restriction, the general principle is clear, that amendments are not permitted which will vary the issue between the parties, or substantially vary the charges of the bill.

Even after general demurrer for want of equity, amendments are granted only where there is some defect as to parties, or some omission or mistake of a fact or circumstance connected with the substance of the case, but not forming the substance itself. Lyon v. Tallmadge, 1 Johns. Ch. R. 184.

There is a class of cases in which, by recent practice, more liberality of amendment has been allowed. Thus, where

upon the final hearing, or even after appeal, it appears clearly from the evidence, that the complainant has a case which entitles him to relief, but which, by reason of some defect or omission in the charges or allegations of the bill, is not brought fairly within the issue, he will be permitted to adapt the allegations of the bill to the case as proven. It is within this class of cases that the complainant seeks to bring the present application. I find no case of such order being made before the testimony is closed. There is a very decided objection to permitting a complainant to vary his allegation and mould the issue according to the real or supposed exigency of the case, while the testimony is being taken. The cases cited do not support this application.

In Champneys v. Buchan, 3 Drewry 5, the replication was permitted to be withdrawn, and the amendment made before any testimony had been taken. It was a case of erroneous allegations which did not however change the issue.

In Bierdermann v. Seymour, 1 Beas. 594, the bill was filed to carry a will into execution. Upon the hearing, it appeared that there was a defect of parties, and that the bill did not contain such charges and allegations as were necessary to enable the court to carry the will into execution. Leave was given to put the bill in proper shape, either by amending, or filing a supplemental bill.

In Watts v. Hyde, 2 Phill. 406, Vice-Chancellor Knight Bruce, at the hearing, being of opinion that the facts in evidence would have made a more favorable case for the plaintiff than that made by the bill, and one which, if unanswered, would entitle the plaintiff to the relief actually prayed, permitted the plaintiff to amend the bill accordingly, but not to extend or vary the prayer or require any answer to the amendment. This, I think, was in accordance with the settled practice of this court. But Lord Chancellor Cottenham reversed the decision of the Vice-Chancellor, regarding the order as a departure from the settled practice of the court and a dangerous innovation.

Ì

In Hill v. Filkin, 2 P. W. 13, the amendment was ordered by Lord Macclesfield, at the hearing, to adapt the statements of the bill to the truth of the case. The character of the amendments do not clearly appear by the report. A motive for the indulgence may perhaps be found in the fact stated by the Chancellor, that both parties pretended great poverty.

The case mainly relied on in support of the application, is that of Darnley v. London, Chatham, and Dover Railway Company, before the Lords Justices, on appeal, 9 Jurist (N-I have not seen the original report, and rely upon the accuracy of a manuscript note furnished by counsel. The company agreed to construct on the complainant's estate such crossings, and of such kind, as should be directed by an engineer. The engineer made his award. pany objected that the award was not made in time. was filed for specific performance of agreement and award. Upon final hearing on pleadings and proofs, the Vice-Chancellor decided that there was a waiver of the time, that the award was valid, and decreed specific performance. company appealed. The lords justices held that there was no waiver as to time, that the award was invalid, and that no relief could be had on the record as it then stood. question was, whether the bill should be dismissed, or the plaintiff have leave to amend so as to give relief upon the agreement, irrespective of the award. Leave to amend was granted. It is not improbable that the decision rests upon some recent statute respecting amendments. The language of Lord Justice Turner is very broad. He says, speaking generally, I should say that leave should be given to amend where the matters proposed to be introduced are connected with the matters in issue, but refused where they are not. This grants a latitude of amendment quite as broad as would be allowed to a party before issue joined. It would enable the complainant to make a case not only inconsistent with, but directly repugnant to the case made by the original bill. This is in direct conflict with the opinions of Lord Hardwicke and Chancellor Kent in the cases already cited.

The case itself may possibly be reconciled with other opinions, inasmuch as it was merely permitting the complainant to adapt his bill to the truth and fact of the case, as it appeared upon the evidence. But the decision has no applicability to a case where the testimony is not closed and the evidence still in progress. It will not be pretended that during the taking of the testimony, the substance of the issue can be changed. It does not support the present application.

From an examination of the amendments proposed, and of the original bill, it appears to me that they do not change the issue between the parties, nor materially alter the grounds upon which the complainant rests his case in his bill as filed. If this be so, there is no real necessity for the amendments. But if I am mistaken in this view, if in point of fact the proposed amendments do change the issue, or introduce new issues, or materially vary the grounds of relief, the proposed amendments should be introduced, according to the practice of the court, by supplemental bill.

The character of the bill is peculiarly complicated. The amount involved is very large; the sum claimed being nearly \$400,000. It is alleged by counsel that the amount depending on one of these amendments exceeds \$100,000. Numerous witnesses have been examined. A large mass of testimony has been taken. The complainant himself has been for several days upon the witness stand, and his crossexamination has not yet been commenced. To introduce material changes into the frame of the bill, to vary the issues, to shift the grounds of controversy, at this stage of the cause, must be fraught with danger and embarrassment in the conduct of the suit.

The allowance of the amendments is a matter of indulgence to be granted at the discretion of the court. Bierdermann v. Seymour, 1 Beav. 597; 1 Eden on Inj. 148-2, note; Watte v. Hyde, 2 Phill. 410.

There is no purpose to deprive the complainant of an op-

portunity of bringing his case fully before the court in the mode most favorable to his interest, so far as it can be done consistently with the ends of justice and the rights of the defendant.

If, in the opinion of his counsel, the amendments are essential to the full presentment of the complainant's claim, they may be effected according to the well settled practice of the court, by supplemental bill.

The question of costs is reserved.

JOSEPH N. TUTTLE, trustee, vs. CATHABINE Howell and others.

A testator gave the residue of his estate, real and personal, in trust to receive the rents and income, and to pay over the net interest and income "in three and one-eighth parts, to wit. one-third part to my daughter C. H., one-third part to my daughter S. B., and one-third and one-eighth parts to my daughter M. D."

Held—that M. D. takes one-eighth of the estate, and not one-eighth of a share, more than the other legatees; the remainder to be equally divided between the three.

Mr. G. F. Tuttle, for trustee.

Mr. A. Dodd, for Catharine Howell and Sally Brogaw, two of the defendants.

Mr. C. Parker, for Maria Duncan, the remaining defendant.

THE CHANCELLOB. The bill is filed to settle the construction of the will of David Doremus, in order to ascertain the shares of the estate to which the legatees are respectively entitled, and to guide the trustee in the discharge of his duty.

By his will, the testator gave the residue of his estate, real and personal, in trust to receive the rents and income thereof,

and to pay over the net interest and income "in three and one-eighth parts, to wit. one-third part to my daughter Catharine Howell, one third part to my daughter Sally Brogaw, and one third and one-eighth parts to my daughter Maria Duncan." The point in controversy is whether Maria Duncan takes one-eighth of the estate, or only one-eighth of a share, more than the other legatees. The language will not admit of a literal interpretation, and will bear, without doing violence to the phraseology employed, either of the constructions contended for. Taken however in connection with other clauses of the will, the intention of the testator is sufficiently clear.

If the testator had intended that his daughter Maria should have taken only one-eighth of a share more than her sisters, the idea would have been naturally and simply expressed by directing that the money should be paid to his three daughters in such proportions that the share of Maria should be one-eighth larger than the share of either of her sisters, or that her portion should be a share and an eighth of a share. But the testator employs no such phraseology. His direction is to pay over the money "in three and oneeighth parts." In other words, in three parts and one-eighth part; or in four parts, one of which shall be one-eighth of the estate, and the other three parts shall be equal to each For he adds, "to wit. one third part to my daughter Catharine Howell, one third part to my daughter Sally Brogaw, and one third and one-eighth parts to my daughter Maria Duncan." Now he cannot mean one third part of the entire estate, for that would be palpably absurd. mean one third part of the residue, or one of the three equal parts into which the fund is to be divided after deducting the one-eighth. The change of phraseology in the two clauses is worthy of notice. He does not, and could not speak of dividing his estate into three thirds and one-eighth. He directs it to be divided into three parts, and one-eighth part, and then directs one of the thirds, or one of the three equal parts, and the one-eighth to be paid to Maria Duncan.

This view of the testator's meaning is confirmed by the language subsequently used in reference to the division of the principal of the fund. He directs that the "principal shall be calculated upon the same basis as the interest is herein calculated, that is one third to each of my daughters, except my daughter Maria Duncan, whose share shall be one third and one-eighth of principal as well as interest." Maria's share is to be, not one third and one-eighth of a third, but the third and one-eighth of principal as well as interest. The very ingenious argument of the defendant's counsel, in regard to the first clause of the will, rests upon the principle that the fractional number always represents the fraction of a unit, or of one integral number, and that the arithmetical formula, 3% parts, technically and necessarily means three parts and the & of one part. Conceding the force of the argument, it has no application to the clause now under consideration, For admitting that 31 dollars does mean three dollars and the & of one dollar, it will not be contended that & and & of a dollar mean & and the & of one third of a dollar. Both the numbers used are fractional, and they indicate fractions or parts of the principal and of the interest of the estate. The bequest is of one third and of one-eighth of the principal as well as of the interest of the estate; that is, as above stated, one-eighth of the entire fund and one third, or one of the three equal parts into which the fund is ordered to be divided after deducting the oneeighth.

The testator further directs as follows: "And upon no construction of this clause in my will shall the children of one deceased daughter have more than the children of another, except the children of my daughter Maria Duncan, who shall take the one-eighth more, in manner aforesaid." The direction is not simply that the children of Maria Duncan shall take one-eighth more than the children of the other sisters, which would have been obviously proper if that was the intention, but the direction is that they shall take the one-eighth more in manner aforesaid; thus directly referring to be plan of division previously indicated.

From these various provisions of the will it is apparent, that in directing that the fund should be divided into three and one-eighth parts, the testator intended that the fund should be divided into four fractional parts of which the entire fund should be the integer or unit, and that each of the parts should be a fraction of that unit, and not the fraction of a fraction. One of these fractions is declared to be one-eighth. The others are to be ascertained by dividing the residue into three equal parts. The result formally expressed will be, that the estate must be divided into twenty-fourths. That the one-eighth will be represented by $\frac{3}{4}$'s, and the other three parts by $\frac{7}{4}$'s each, and that consequently the shares of Catharine Howell and Sally Brogaw will be $\frac{7}{4}$'s each, and the share of Maria Duncan $\frac{1}{2}\frac{3}{4}$'s.

It is urged as an argument against this construction, that a testator will not be presumed to have intended to make any greater difference between his children in the distribution of his property, than his language clearly and necessarily indicates. That the law gives the estate to the children equally, and that such equality will not be disturbed, except such intent is clearly expressed or necessarily implied, and this in analogy to the familiar maxim that the heir-at-law can only be disinherited by express devise or necessary implication. The anology relied upon is sufficiently obvious where it is doubtful whether the testator has bequeathed a portion of his personal estate, or has died intestate in regard to it. The title of the heir-at-law will not be divested, except the intent be clear.

But it is perfectly clear in this case that the testator did not intend to die intestate as to any portion of his estate. Neither of his children can take anything by operation of law, as next of kin. They must take by gift from the testator, unless the bequest fail from uncertainty. It is equally clear that the testator intended that the shares of his children should be unequal. The degree of inequality is the only point of inquiry. It is a pure question of construction and cannot be materially affected by the operation of the principle contended for. The utmost that can be claimed for the

principle is that it should be resorted to where every other rule of construction fails. In the present case there is no room for its application.

WILLIAM P. BREWER vs. SAMUEL K. WILSON.

- 1. Equity will not decree the specific performance of a contract, if it reasonably doubtful whether the contract was finally concluded. The parties will be left to their remedy at law.
- 2. Specific performance will not be decreed on the ground of part performance of the contract, unless the part performance has been such clearly to take the case out of the operation of the statute of frauds.

Mr. E. T. Green, for complainant.

Mr. E. M. Shreve, for defendant.

Cases cited by complainant's counsel. Nix. Dig. 330, § 9, § 14; 1 Sugden on Vendors 160, ch. 3, sec. 7; 2 Parsons on Con. 284; Whitbread v. Brockhurst, 1 Bro. Ch. R. 417; Hamilton v. Jones, 3 Gill. & Johns. 127; Heth's Ex'r v. Wooldridge's Ex'r, 6 Randolph 607; McKec v. Phillips, 9 Watts 85; Parkhurst v. Van Cortlandt, 1 Johns. Ch. R. 274; Frame v. Dawson, 14 Vesey 386; King v. Hamilton, 4 Peters' S. C. R. 311; 4 Kent's Com. 451; Earl of Aylesford's case, 2 Strange 783; Meeker v. Meeker, 16 Conn. 408; 1 Story's Eq. Jur., § 742; Butcher v. Stapely, 1 Vernon 363; Pyke v Williams, 2 Vernon 455; Lacon v. Mertins, 3 Atk. 1; Morphett v. Jones, 1 Swanst. 172; Clerk v. Wright, 1 Atk. 13; McLeish v. Tate, Cowp. 781; Alsopp v. Patten, 1 Vernon 472; Owen v. Davis, 1 Vesey, sen., 82; Attorney-general v. Day, Ibid. 221; Potter v. Potter, Ibid. 441; 1 Story's Eq. Jur., § 763; Newland on Con. 183; Eaton v. Whitaker, 18 Conn. 222; Tilton v. Tilton, 9 N. H. 386; Lowry v. Tew, 3 Barb. Ch. R. 407.

Cases cited by defendant's counsel. Smith v. McVeigh, 3 Stockt. 239; 1 Story's Eq. Jur., § 742, § 769; Lokerson v. Stillwell, 2 Beas. 359; Fry on Sp. Perf., § 397, § 418; Phillips v. Trompson, 1 Johns. Ch. R. 131; Allen's estate, 1 Watts & Serg. 383; Pugh v. Good, 3 Watts & Serg. 56; Fry on Sp. Perf., § 387, note 27; Gilbert v. the Trustees, 1 Beas. 180, 204; Stoutenburgh v. Tompkins, 1 Stockt. 336, 242; Fry on Sp. Perf., § 425, § 432, § 457.

THE CHANCELLOR. The bill is filed to enforce the specific performance of a contract for the sale of real estate. The contract rests in parol. The complainant alleges, that on the day of the contract, and in part performance thereof, he surrendered the occupation of the premises to the purchaser, and put him in the full possession and enjoyment thereof. The defendant, by his answer, denies the making of the contract and the delivery of possession of the premises, as set out in the complainant's bill. The burden of proving both issues is upon the complainant.

The material terms of the contract, so far as the negotiation proceeded, are not disputed. The contract was for the purchase of a stable, for which the defendant was to pay The deed was to be made in a few days thereafter, and the purchase money was to be paid on the delivery of the deed, by the defendant's check therefor, payable in sixty Thus far the parties agree. But the defendant alleges that the contract was not closed. That during the negotiation he had objected that the location of the premises was hazardous, the building being peculiarly exposed to danger from fire, and that the defendant was at liberty, before the delivery of the deed, to satisfy himself upon that point, and that if his investigation did not prove satisfactory, he was under no obligation to take the title. That his investigation proved unsatisfactory, and upon that ground he declined to accept the title. The material question presented by the issue between the parties is, whether the contract was, or was not, finally closed. No one was present at the close Vol. II.

of the negotiation but the parties themselves. The proof of the contract rests upon their testimony alone. They are in direct conflict upon the point in issue. There is nothing in the testimony of the parties which can be regarded as decisive of the question. The complainant relies upon the partial occupancy of the premises by the defendant, and his statement to his hired man that he had bought the stable, as corroborative proof of the allegations of the bill, sufficient to overcome the defendant's answer. It may be admitted, that this additional evidence is sufficient to obviate the technical objection that something more than the testimony of a single witness is necessary to overcome the allegations of the answer, and that it does incline the scale in favor of the complainant's statement. But it is not absolutely inconsistent with the defendant's view of the case, and cannot, therefore, be regarded as conclusive of the question, whether the contract was, or was not, finally closed.

A specific performance will not be decreed, unless the existence and the terms of the contract be clearly proved. It must be shown that a contract has been concluded. If it be reasonably doubtful whether the contract was finally concluded, equity will not interfere by decreeing a specific performance, but will leave the parties to their remedy at law. Huddleston v. Briscoe, 11 Vesey 591; Stratford v. Bosworth, 2 Ves. & B. 341; Fry on Spec. Perf., § 164.

But admitting the contract to be satisfactorily proved, has there been such part performance as to take the case out of the operation of the statute of frauds? The allegation of the bill is, that on the day that the agreement was made; and in part performance of the contract, the complainant surrendered to the defendant the occupation of the premises; and put him in the full posession and enjoyment thereof, and delivered him the key of the stable, and that the defendant has ever since been in posession of the premises, under and by virtue of the contract. These facts are explicitly denied by the answer. The admitted facts are, that on the day on which the contract was made, the defendant, with the assent

of the complainant, put two of his horses in the stable. harness of the horses, and some straw for their use, were subsequently placed there by the defendant's servants. part of the building was occupied by a third party, under lease, who, it was agreed, might remain in possession. rest of the stable was in the actual occupancy of the com-He had upon the premises, on the 24th of December, the day of the agreement, several horses, carriages, harness, hay, feed, and other articles. These articles remained upon the premises until after the 26th of December, when a deed was tendered by the complainant, which the defendant refused to accept, denying the obligation of the A day or two afterwards, the deed for the premises was again tendered, and its acceptance refused by the Most of the complainant's property appears to defendant. have been removed from the premises, after the deed had been once tendered to the defendant. The defendant's property was removed after the second tender and rejection of the deed. There were two keys to the stable. One was retained by the complainant. Tho other was delivered to a servant of the defendant. Both parties had free access to the premises, to the extent of which they were respectively used and occupied by them. The complainant alleges in his evidence, as well as in his bill, that he delivered formal possession of the premises to the defendant, and that he continued to occupy a part of the premises by the defendant's The defendant, by his evidence, as well as by permission. his answer, denies that the premises were in his possession. He alleges that, as a matter of convenience, with the assent of the complainant, he occupied a small portion of the stable, but that the rest of the premises remained in the possession and under the control of the complainant. In point of fact, the bulk of the premises remained in the actual occupation and enjoyment of the complainant, till after the deed had been tendered and refused. A subsequent abandonment of the premises cannot affect the question.

That the purchaser, in anticipation that the contract would

be carried into effect, should have been permitted to occupy a portion of the premises, is not improbable, especially if it did not materially interfere with the enjoyment of the premises by the vendor. But even if the contract was concluded, why should the vendor have made a formal delivery of the possession of the entire premises to the purchaser, and made himself a tenant at sufferance before the deed was delivered, or a dollar of the purchase money paid? It is not in accordance with the ordinary course of business. No satisfactory reason is assigned for so unusual a proceeding. The declarations of the defendant, that the complainant's property might remain upon the premises until he was notified to remove it, and that the complainant's lessee might retain possession of the room occupied by him till the expiration of his term, are clearly referable to the terms of the contract, and cannot operate to affect the relations or the rights of the parties, prior to the delivery of the title.

If the situation of these parties was reversed; if the purchaser was here seeking to enforce this contract against the vendor, upon evidence on his part, similar to that now before the court, there could be no hesitation as to the result. The court could not hold that the vendor, before parting with his title, or receiving any part of the consideration, and while in the actual occupancy of the major part of the premises, had delivered legal possession to the purchaser, and held only as tenant at sufferance under him. Nothing but the most unequivocal testimony could justify such conclusion. Where the evidence is conflicting, the extreme improbability of the fact alleged must be decisive of the controversy.

The statute prohibits the maintenance of an action upon a contract for the sale of land, unless the agreement, or some memorandum or note thereof, be in writing. The wisdom of the provision is abundantly vindicated by the evidence in this case. Courts of equity are as much bound by the provisions of the statute as courts of law, and are not at liberty to disregard them. 1 Story's Eq. Jur., § 753.

٠٠.

Von Hurter v. Spengeman.

The principle upon which equity interferes to enforce the specific performance of parol agreements, void by the statute, on the ground of part performance is, that otherwise one party would be able to practice a fraud upon the other. 1 Story's Eq. Jur., § 759.

The policy of permitting the express provisions of the statute to be thus evaded in any case, has been seriously questioned. It should be tolerated only where there is no reasonable room for doubt. The complainant's evidence does not bring his case within the operation of the principle.

The bill must be dismissed.

EMMA VON HURTER, an infant, by her next friend, va. CONRAD SPENGEMAN.

- 1. A party who acts as the agent of another in the sale of land, and receives the purchase money therefor as such agent, is estopped from questioning the title of his principal to the premises, or to the proceeds of sale.
- 2. A purchase by an agent or trustee in his own name, while in the performance of his office, enures to the benefit of his principal or cestus que trust.

Mr. A. S. Jackson, for complainant.

A trustee has no right to avail himself of his position for his own benefit. 2 Stary's Eq. Jur., § 1211, and notes, § 1211 a, § 1261, § 1265; Mulford v. Bowen, 1 Stockt. 797.

Equity will decree the execution of the trust. Kimball v. Morton, 1 Halst. Ch. R. 26.

A formal acceptance of the trust not necessary. Scull v. Reeves, 2 Green's Ch. R. 84.

Mr. Winfield, for defendant,

Von Hurter v. Spengeman.

The bill alleges that in the year 1846. THE CHANCELLOR. Edward F. Von Hurter became seized in fee of a lot in Jersey City, and after mortgaging the same for \$825, in January, 1860, agreed to convey the premises to George W. Korn, for \$3000. Having previously conveyed the legal title to one Michael Lienan, and having only an equitable title in the premises, Von Hurter, in order to carry his contract with Korn into effect, caused a bill to be filed for the foreclosure of the mortgage and the sale of the mortgaged premises. On the 2d of July, 1860, the premises were sold under a decree of this court, and struck off and conveyed to Spengeman, the defendant, for \$2005. Spengeman mortgaged the lot for \$1000, and on the 1st of September, 1860, he conveyed it to Korn, in fulfilment of the contract of Von Hurter, for \$3000. The mortgage of \$1000 constituted a part of the consideration, and the balance of \$2000 was paid by Korn to Spengeman. For this sum the bill prays that the defendant may be decreed to account, as trustee for the complainant.

The bill further charges, that the complainant was the adopted daughter of Von Hurter, and had been nurtured, maintained and educated by him and his wife from her infancy until the year 1860. That in May, 1860, Von Hurter, having lost his wife and being about to return to Europe leaving the complainant in this State, appointed Spengeman her guardian, and constituted him the trustee of the fund in question for her benefit.

The material allegations of the bill are either admitted by the answer or satisfactorily established by the evidence. It appears from the answer and evidence in the cause, that Von Hurter not only appointed Spengeman the guardian of the complainant during her minority, but that he also constituted him his attorney, with power to collect all debts and demands due and owing or of right belonging to him in America, and after satisfying certain specified claims and defraying necessary charges and expenses, to appropriate the residue to educate, support and maintain the complainant

Von Hurter v. Spengeman.

during her minority. The defendant admits that by virtue of this power, aside from the fund in question, he has received over \$800, and claims to have expended in pursuance of the trust vested in him, over \$2400, for which he exhibits his account.

The simple inquiry now is whether the defendant is bound to account to the complainant for the fund in question. Whether he has been guilty of a breach of trust by a misappropriation of the funds in his hand, and whether the account rendered by him is true and fair, may become subjects of inquiry hereafter. The defendant, by his answer, does not deny his liability to account for a part of the funds placed in his hands by Von Hurter. He exhibits an account, by which he claims to have expended, in execution of the trust for the benefit of the complainant, not only the amount of funds in his hands, for which he admits his liability, but also a large portion of the fund in controversy.

But the defendant objects, first, that at the time of the sale to Korn, the title to the lot in question was not in Von Hurter, but that the premises had previously been conveyed to Michael Lienan to secure a debt due to him, and to defeat the claims of Von Hurter's creditors. There is no evidence of fraud practiced or meditated in the conveyance to Lienan. there was, the objection does not lie in the mouth of this defendant. The land was sold to Korn as the property of Von The sale was effected by the defendant. The title was perfected in Korn, and the purchase money was paid to the defendant as the agent of Von Hurter, in fulfilment of that contract. The defendant is estopped from questioning Von Hurter's title to the premises, or to the proceeds of the sale.

The defendant further objects that this property was not purchased by him at the sheriff's sale, as trustee of the complainant, or for her benefit, but that it was purchased in his own name, with his own money, and for his own benefit. It is shown by the evidence, that he prevented competition at the sale by stating that he wanted to save the property for

Von Hurter v. Spengeman.

Von Hurter or his family, or in the language of another witness, that "he was going to bid it in for the benefit of Emma," the complainant. But aside from this testimony, the defendant was not in a position to purchase the property for his own benefit. He was the recognized agent of Von Hurter in the transaction, and the trustee of the fund for the complainant. He negotiated the contract of sale to Korn, and after the title had been perfected by a sale to him, under the decree of this court, he conveyed the premises in pursuance of the contract. A purchase by an agent or trustee in his own name, while in the performance of his office, enures to the benefit of his principal, or cestui que trust. 2 Story: Eq. Jur., § 1211, § 1211 a.

Again, it is urged that the fund in question was not the property of the complainant, and constituted no part of the fund entrusted to the defendant for her benefit. The objection is founded upon the terms of the deed from Von Hurter, appointing Spengeman guardian of the complainant, and conferring on him the title to the exclusive charge of the person and estate of the complainant. Neither at that time, nor afterwards, had Emma Von Hurter, the complainant, any estate in the land, and it is argued, therefore, that under the terms of the deed she acquired none, either in the land itself or in the proceeds of the sale.

It is not perceived that the terms of the deed, so far as they relate to the appointment of the defendant as guardian, can in any wise affect the rights of the parties. The complainant was not the daughter, but an adopted child of Von Hurter; and for the purpose of this suit, the appointment of guardian may be treated as inoperative and void. But by the same instrument, the defendant is constituted the attorney of Von Hurter, with power to collect all debts and demands of whatever nature and kind, either in law or equity, which were or might be due and owing, or of right belonging to Von Hurter, in America. At the date of the deed there was a subsisting contract for the sale of the land from Von Hurter to Korn, and an engagement on the part of the

vendee to pay the purchase money to Von Hurter. This constitutes the fund in question. By the terms of the deed the residue of the moneys to be collected by the defendant, after defraying certain claims, and paying charges and expenses, were to be appropriated by him to the education, support and maintenance of the complainant till she attain the age of twenty-one years. This constituted the estate of the complainant, of which the defendant, as her guardian, was to have the custody.

It was suggested at the hearing, that Lienan was a necessary party to the suit, on the ground that the decree of fore-closure was against him, as the owner of the equity of redemption, and that the surplus money arising from the sale was, by the order of this court, directed to be paid to Spengeman, he having been authorized by Lienan to receive the same. The objection has been obviated by making Lienan a party defendant. By his answer he admits the equity of the bill, and assents to a decree in favor of the complainant.

The complainant has not been furnished with the funds necessary for her maintanance and education. She is entitied to the relief prayed for. There must be a decree accordingly, and a reference to a master to take and state the account.

JOHN S. IRICK vs. JOHN BLACK and WM. C. LIPPINCOTT.

- 1. A surety who has paid the debt of the principal, is at once subrogated to all the rights, remedies and securities of the creditor.
- 2. Where the debt has become payable, the surety may file a bill to compel payment by the principal, in order that he may be relieved from responsibility.
- 3. Where the creditor is fully indemnified, where he is subjected to no delay and exposed to no risk of loss, he will be compelled to resort to the property of the principal in satisfaction of his claim, before coming upon the surety.

- 4. A denial by the defendant upon information and belief will not avail to dissolve the injunction. He must answer upon his own knowledge.
- 5. Upon a bill by the surety to compel the payment of the debt by the principal, neither notice to the creditor of the sureti-ship, nor an allegation of irreparable injury if the surety be compelled to pay the debt, constitute an essential element of the surety's right to equitable relief.
- 6. The conferring of equitable powers upon common law courts does not take away or abridge the jurisdiction of a court of equity. It consumes simply a case of confurent jurisdiction, where either tribunal may afford relief, at the option of the party aggreed.
- 7. Every one is a necessary party to a bill, whose joinder is necessary to the settlement of the complainant's rights. But a defect of parties is not necessarily a reason for dissolving the injunction.
- 8. An injunction will not be dissolved as of course, even upon a full denial of the equity of the bill, if the court see good reason for retaining it Its dissolution depends upon the sound discretion of the court.

The bill alleges that the complainant and one John Black, jun., on the 17th of March, 1855, gave their joint bond to Beulah Merritt and Keziah Merritt, in the penal sum of \$6000, conditioned for the payment of \$3000 in one year, That the bond was given to secure the re-paywith interest. ment of a loan made by the obligees to the said John Black, jun., by his procurement, and for his individual account, the complainant having joined in giving the said bond as surety, at the solicitation of Black. The interest accruing upon the bond was paid by Black from time to time, until the seventeenth of March, 1864. Failing to pay the interest which then became due, on the third of May, 1864, judgment was entered upon the bond, and an execution issued against the goods and lands of the obligors, which was levied upon the property of Black, to an amount sufficient to satisfy the execution. After the levy had been thus made, John Black, the father of John Black, jun., knowing that the bond was given for a loan made to his son, and that the judgment entered thereon was for his individual debt, procured an assignment of the judgment to be made to him, and having thus secured the control of the execution, he di-

ted the sheriff to sell the property of the complainant to isfy the judgment, which the sheriff threatens to do.

The bill further charges that John Black, jun., is largely lebted, and that if the complainant is compelled to satisfy execution now levied upon Black's property, it may be ced beyond the reach of any judgment which may be hereer recovered against him by the complainant.

The bill prays for an injunction, restraining the sale of complainant's property, until the property of Black, zed by virtue of the execution, shall have been sold, and proceeds applied in satisfaction of the judgment. An intendication issued pursuant to the prayer of the bill. The decidant now moves to dissolve the injunction.

Mr. F. Voorhees, for defendant, John Black, in support the motion.

The bill rests upon these three facts:

1. That Irick signed the bond simply as surety. 2. That ere was a concert between John Black, jun., and his father, get control of the judgment, with full knowledge that Irick is simply surety. 8. That John Black, jun., is utterly inlevent.

The bill is sustained by the affidavit of Irick alone. lams' Equity 196; Manchester v. Dey, 6 Paige 295.

Where the answer denies the equity, injunction will be dislived. 3 Daniell's Ch. Pr. 1831, note 1; Adams' Equity 6; 2 Story's Eq. Jur., § 1528. When the answer denies e equity, the bill will be dismissed.

No relief can be granted under this bill. There can no relief different from the prayer. The charge is at Black urchased with fraudulent intent. The comainant's knowledge as to the facts is only upon informan and belief. All combination and conspiracy are fully despressly denied by the answer. The bond and judgent are against both the defendants as principals. The ct of sureti-ship may be shown. But it must be by clear idence. The presumption is against it. The affidavit of

John Black, jun., owing to his peculiar position, should have the same force and effect as if he had been made a party, and had set out the facts in his answer.

If Irick had signed simply as surety, that would not emtitle him to relief in this court. He might have full remed at law. He is bound to show that he is in danger of being irretrievably injured.

The mere averment that Black may put his property on to of his hands, and that he is largely indebted, shows no real danger. The complainant's remedy is at law. Story's Equiple, § 490; Mitford's Pl. 125-6; Nix. Dig. 669, § 160; Act of March, 1855, § 40.

John Black, jun., is a necessary party to the bill. There can be no decree without him. 1 Daniell's Ch. Pr. 240, note; 1 Eden on Inj. 71, note 2; Story's Eq. Pl., § 72, note 4, and cases cited.

If any person is affected by plaintiff's claim, or has a consequential interest as surety, he is a necessary party. 1 Daniell's Ch. Pr. 292, 329; Smith's Ch. Pr. 91, note a, 92 note, 517.

If a necessary party is not before the court, the objection may be insisted upon at the hearing. Story's Eq. Pl., § 541; 1 Barb. Ch. Pr. 115; 1 Daniell's Ch. Pr. 393, 337; Robinson v. Smith, 3 Paige 222; Mitchell v. Lennox, 2 Paige 280.

The interest of John Black, jun., will be affected by this decree. If so, he is a necessary party. The decree takes \$3000 out of his pocket. He is not before the court. He is directly and materially interested. The bill is radically defective without him.

The rights of the assignee must be protected.

If the fact of the sureti-ship does not appear on the face of the papers, notice must be given to the assignee, or his rights are in no wise abridged. Kaighn v. Fuller, 1 McCarter 419; Van Hook v. Whitlock, 3 Paige 412; Broadway Bank v. McElrath, 2 Beas. 26.

The proof of sureti-ship is on the surety. The bill should be dismissed.

Mr. Merritt, for complainant, contra.

& Minot 13.

The notice of this motion states three grounds, on which relief will be asked for.

1. That there is no equity in the bill. 2. A want of Proper parties. 3. That the equity has been fully answered. The whole equity of the bill rests on the ground of suretish ip. The bill alleges the fact of suretiship. The answeres not deny it except upon information. Even where there is an express denial, the injunction will not be dissolved upon of course. The injunction will not be dissolved upon there denial of answer, where auxiliary evidence is offered. 1 Eden on Inj. (Waterman) 145; Orr v. Littlefield, 1 Wood.

The large indebtedness of defendant is expressly alleged in the bill. It is not as explicitly denied in the answer. Ward v. Van Bokkelen, 1 Paige 100; Fulton Bank v. N. Y. & Sharon Canal Co., Ibid. 311.

The equities are attempted to be denied by new matter introduced in the answer, viz. that the money was borrowed for an iron company, and not for Black's use. New matter in an answer is not sufficient to dissolve the injunction, however responsive. Morris Canal v. Jersey City, 1 Beas. 227; S. C., 3 Stockt. 13; Brewster v. City of Newark, Ibid. 114.

There is an exception to this new matter, viz. that the money was not only borrowed for the company, but that it was to be paid out of that fund. It is clear that the obligor can not prove that the money was to be paid in a different way from that specified in the bond, nor that it was to be paid out of a particular fund, when the bond is general. Chetwood v. Brittan, 1 Green's Ch. R. 438.

The true test of the necessity of a party is, can a valid decree be made in regard to the subject matter of litigation without him. If so, he is not a necessary party. Bailey r. Inglee, 2 Paige 278. One may be a proper though not a necessary party. Joy v. Wirtz, 1 Wash. C. C. R. 517.

Black is a necessary party, the injunction will be con-

tinued with leave to bring him in on equitable terms. ley v. Corse, Saxton 504; Layton v. Ivans, 1 Green's Ch. 387.

Mr. P. D. Vroom, on the same side.

If this money in equity should be paid by John Blac- k, jun., the plaintiff will not be permitted to collect it of Iric 🍱 The injunction will prevent a circuity of action, and w save Irick from the hazard of loss. Black (the father) to-k the assignment, as the bill alleges, with notice of his sonliability as principal, and now seeks inequitably to comppayment by Irick.

The interference of the court is on the general ground The application need not be founded on fraud, n_r equity. need fraud be charged. The equity of the bill is clear - 1 the ground of sureti-ship. 2 Story's Eq. Jur., § 884-5. The equity of the bill is not denied by the answer.

its material allegations are made on information and beli-f. The defendant "believes" that the money was not borrowed for his son's individual account; that his son paid interest — n assurance of re-payment; that the goods of the son a sufficient to satisfy the execution. These are the materipoints, and rest merely upon information and belief.

The answer admits a conversation with Merritt; that L stated that Black had the money to pay. That is a clear admission of notice. The new matter will not aid the dfendant on this application. It is not responsive to the bill LIt goes beyond mere matter of explanation, and can not explanation, title the defendant to a dissolution of the injunction.

The injunction will not be dissolved upon affidavits merel 5 but upon averments contained in the answer. Even after full answer, the injunction will not be dissolved as of course. If it appears that greater injury will be done by a dissolution, than can arise from its continuance, the injunction will not be dissolved even after a full answer. 3 Daniell's Ch. Pr. 1831; Poor v. Carleton, 3 Sumner 75-6.

Dissolution is a matter of discretion. The admissions of he answer afford strong reason for continuing it.

be answer denies that Black alone is liable, or that Irick here surety. It states that the money was for the firm. It is bound for the firm according to the terms of the Id, and yet Black is seeking to make the whole money out Irick. This alone is sufficient ground for retaining the metion.

defect of parties is no ground of dissolution. The bill be amended in this particular. It is not a pure injuncbill. It involves, necessarily, a question of right, and court will see that it is fairly settled.

Ir. Voorhees, in reply.

HE CHANCELLOR. The right of a surety, as against his icipal, to be protected from loss by reason of his sureti-, so far as it can be done without prejudice to the rights he creditor, is a recognized and familiar doctrine of equity. en the surety has paid the debt, he may not only call upon, principal to re-imburse him, but for the purpose of obing indemnity from the principal, he is at once subroed to all the rights, remedies, and securities of the creditor. is his remedy confined, as at law, to the obtaining ininity after the payment of the debt. But as soon as the t has become payable, he may file a bill to compel payit by the principal, in order that the security may be eved from responsibility. He may, in special cases, comthe creditor to resort to securities in his hands before ing upon the surety. And although the creditor will as a matter of course, be restrained from enforcing his its against the surety till his remedies against the prin-I are exhausted, yet when the creditor is fully indemni-, where he is subjected to no delay and exposed to no risk ss, he will be compelled to resort first to the property of principal in satisfaction of his claim. If the court is ed to interfere on behalf of the surety before judgment is vered against him, he must present some special ground quitable relief. Where judgment has been recovered

against both parties, the equity of the complainant, to have the property of the principal first applied to satisfy the execution, is clear. This equitable doctrine has been expressly sanctioned by the legislature of this state, and the exercise of the power conferred upon the courts of common law. Nix. Dig. 669, § 160.

It is difficult to conceive a clearer case for the exercise of the power than that presented by the complainant's bill. A judgment has been recovered against the principal and the Execution has been issued and levied upon the property of the principal, amply sufficient to satisfy the claim. The sheriff was instructed by the plaintiff in execution, in accordance with the clearest dictates of justice and equity, to make the debt out of the property of the principal. Thereupon the father of the principal purchased the judgment, took an assignment with a power of attorney to control the execution, and instructed the sheriff to make the debt out of the property of the surety. It is against that inequitable act that the complainant asks relief. The bill further alleges, that the assignee of the judgment took the assignment with full knowledge of the equitable rights of the complainant, and further, that the principal debtor is largely involved in debt, and that if the surety is compelled to satisfy the judgment, he will be exposed to the hazard of losing all means of indemnity against his principal.

The material charge of the bill upon which the complainant's equity mainly rests is, that Black is the principal debtor, the complainant being the surety only. This fact is distinctly and unequivocally charged in the bill. It is denied by the defendant, only upon information and belief. Such denial will not avail to dissolve the injunction. The defendant must, in order to entitle himself to a dissolution of the injunction, answer upon his own knowledge. Everly v. Rice, 3 Green's Ch. R. 553; Ward v. Van Bokkelen, 1 Paige 100.

But it is urged that the injunction must be dissolved, inasmuch as the defendant has explicitly denied the complain

s allegation that the defendant, before taking the gnment of the judgment, had notice of the fact that the plainant was surety only for the debt; and also the alleon that the principal was largely indebted, and that complainant, by paying the judgment, would be exed to the hazard of loss.

leither of these allegations of the bill is essential to the plainant's case. The surety's claim to equitable relief gainst the principal, does not depend upon the fact that creditors had notice of the sureti-ship. Nor does the of that notice at all interfere with the creditor's right to orce his claim for the recovery of his debt. The cominant does not deny the creditor's right to recover his t, nor does he seek to impair his remedy. The defendant s not allege that his security will be in any wise impaired granting the relief prayed for. On the contrary, he exity admits that the property of either of the defendants ied upon by virtue of his execution, is amply sufficient to To him, as execution creditor, it is a matter of his debt. al indifference, which of the defendants pays the debt. e controversy is a pure question of equity between the dedants, the decision of which cannot affect the substantial hts of the creditor.

Nor does the allegation that the surety will be in danger losing his means of indemnity against the principal, contute an essential element of the complainant's claim to ief. The complainant's equity, as recognized in this court I as expressly declared by the statute, is to have the proty of the principal debtor, rather than that of the surety, ere both are under execution, applied in satisfaction of judgment. The fact of irreparable injury is no element his right to recover, although it may strengthen the claim relief and quicken the action of this court. The court II interfere though the principal is perfectly able to rend in damages, and there be no danger of eventual loss, interferes to compel payment by the principal, rather than saurety, in order to enforce the performance of the obvious

duty of the principal to protect the surety from a needlessiburden, and to prevent circuity of action.

The defendant, by his answer, denies that he purchase the judgment at his son's request, or by virtue of any arrangement or understanding with him in relation thereto, o in relation to the party of whom the payment was to be col lected, and alleges that he purchased it of his own accor and for his own purposes. Here is a full denial by the creditor of any combination with the principal for any sinis ter or fraudulent purpose, and an express avowal that the act was done for purposes of his own. In point of fact, there defendant, immediately after purchasing the judgment, couptermanded the orders which had been given to the sheriff to -0 raise the debt out of the property of his son, and ordered the sheriff to levy and make the debt out of the property of the Now it is obvious that the judgment was not purchased as an investment, nor to give indulgence to the defendant, for the purchaser proceeded immediately to collect = the debt. Nor were his instructions to the sheriff given to 0 secure or advance his rights as a judgment creditor, for here admits that the levy under the execution upon the property of the principal was amply sufficient to pay the debt. execution creditor, it was totally immaterial out of which defendant's property the debt was made. The judgment must have been purchased by the father, and the instructions to the sheriff given, either to promote the interests of hisson, by satisfying the judgment out of the property of the surety; or, if done strictly for his own interest, it must have been to relieve his son's property from the lien of the execution, in order to charge it with some claim of his own. In either event, his purpose was to satisfy the debt out of the property of the surety, and thus defeat his equitable right to have the debt paid in the first instance out of the property of the principal, and to put at hazard his means of indemnity. In all its aspects, I think the equity of the bill is virtually confessed by the answer.

It is further insisted that the complainant has a complete and adequate remedy at law, and therefore has no title to

relief in this court. He can have no redress anywhere, except by the interposition of a court of law or of equity, to protect and enforce his claim to equitable relief. By the statute already referred to (Nix. Dig. 669), the legislature have conferred upon the court, out of which the execution issued, the power of administering equitable relief, where a judgment is recovered against both principal and surety. But it is perfectly well settled, that the conferring of equitable powers upon the courts of common law, does not take away or abridge the jurisdiction of a court of equity. It constitutes simply a case of concurrent jurisdiction, where either tribunal may afford relief, at the option of the party aggrieved.

It is insisted further that the bill is defective for want of proper parties, inasmuch as the principal debtor is not made a defendant. The objection is well taken. The injunction in this cause cannot be made perpetual without affecting the rights of the alleged principal. It is true, that not being a party, he will not be bound by the decree. that very reason he is a necessary party. The complainant is entitled to have both the defendants in execution before the court, in order that their rights, as well as his, may be finally settled. Whether the defendants in execution do, in fact, occupy the relation of principal and surety, is, in fact, the main subject of controversy, and that question cannot be settled, either as between the defendants themselves, or in relation to the rights of the complainant, unless they are both parties to the bill. But a defect of parties is not necessarily a reason for dissolving the injunction. The bill may be amended without prejudice to the injunction.

The affidavit of John Black, jun., is annexed to the answer. He denies, explicitly, the charges of the bill, that the loan was made for his individual benefit, and that the complainant signed the bond as surety only. It is objected, with much apparent reason, that the complainant should not be permitted to gain an unfair advantage, by omitting a necessary party. That if Black had been made a party, his

answer would have dealed the whole equity of the bill, an elemential the defendants to a dissolution.

There is no good reason to suppose that the party wa comitted for the sake of gaining an unfair advantage. The frame of the bill justifies the belief that he was not deemed a necessary party. The objection may constitute a very good deceason why the defendants should be permitted to renew their motion to dissolve, after the amendment has been made a and the answer filed. But supposing that Black had been made a party, and had answered, denying the equity of the bill as explicitly as he has done by his affidavit, as the case now stands. I do not apprehend that the injunction must have been dissolved.

It is well settled that the injunction will not be dissolved as of course, even upon a full denial of the equity of the bill. I his fifthe court see good reasons for retaining it. Its dissolution depends upon the sound discretion of the court. Chelicold v. Buttac. 1 Green's Ch. R. 438; Greenin v. Hoey, I stockt. 137; Furnam v. Clark, 3 Stockt. 135; Stockbury v. Vall. 2 Bins. 304; Roberts v. Anderson, 2 Johns. Ch. R. 202; Pose v. Carleton, 3 Summer 75; Orr v. Littlefield, II. 1 Word. & Miner 13.

In this case, the complainant has annexed to his bill am affidavit of the attorney of the original creditors and plaintiffs in execution, by whom the loan was negotiated and the bond drawn. His evidence distinctly and tully confirms the charges of the bill, that the loan was made for the individual benefit of Black, and that Irick signed the bond as surety only. His evidence upon this point is full, clear, and unequivocal. Under such circumstances, especially where the dissolution of the injunction must defeat the complainant's equity, and effectually deprive him of the relief sought, the injunction should be continued to the hearing.

The motion is denied.



Hoff v. Burd et al.

JOHN D. HOFF vs. Moses Burd and others.

Then the cause is heard upon the bill and answer, as between the tinant and the defendant who answers, all the allegations of the antust be taken as true.

There, at the time of the execution of a mortgage, for the foreclosure ch a bill has been filed, the mortgagor had no right, title, or interest for in the mortgaged premises, and no power or authority to execute ortgage, but the title was in other parties, of whom the answering ant was one, such defendant is entitled to a decree of dismissal.

he answer of one defendant is no evidence against a co-defendant. less can such answer avail a defendant, when not responsive to the s of the bill, but designed to establish a case in his favor, not within ope of the complainant's case.

n admission or allegation of fact in the answer will not avail the tinant, unless put in issue by the bill. If he desires to avail himsuch fact, he must amend his bill.

f an answering defendant seeks a decree to establish claims outside issue made by the pleadings, he must file a cross-bill.

- . Bullock, for complainant.
- . G. A. Allen, for Elijah Burd, one of the defendants.

E CHANCELLOR. The bill is filed to forcelose a mortgiven to the complainant on the 8th of March, 1853,
oses Burd, one of the defendants, to secure the payof \$400. No answer is filed by the mortgagor. The
is brought to hearing upon the bill, and answer of
h Burd, a son of the mortgagor, who is made defendant
subsequent mortgagee, and also as the owner of the
y of redemption in part of the mortgaged premises.
e answer alleges that at the time of the execution and
ery of the mortgage to the complainant, the flortgagor
no right, title, or interest in the mortgaged premises,
my power or authority to execute the mortgage, and
the mortgage was therefore null and void.
e answer further alleges that the mortgagor derived his

Hoff v. Burd et al.

title from Daniel Smith, who had a life estate only in The

premises; that Smith died before the execution of the magage, and that upon his death the title passed by devise in this father to the children of Ann Burd, the wife of mortgager, and that at the execution of the mortgage title to the premises was vested in the seven children sons and two daughters) of Ann Burd, as tenants in communications.

The answer further states, that on the tenth of Marc-1 1857, the five sons of Ann Burd (of whom the defendance Elijah Burd, was one) executed to their father, Moses Bura release of all their title and interest therein. That on the seventeenth of May, 1858, Moses Burd executed to the defendant, his son, Elijah, a mortgage upon said premises, secure the payment of \$800. That on the fifth of June 1858, Ehjah acquired a valid title to the shares of the two daughters of Ann Burd, who had not released to the father. That on the eleventh of June, 1860, Moses Bura

The an wer further alleges, that in 1861, by a decree this court, the release executed to Moses Burd by his sorwas, as to John Burd, one of the sons, declared frauduler and void. That thereupon the defendant, Elijah, purchase the share of John for a valuable consideration, and tooffrom his father, Moses Burd, a deed for thirty three acresto secure the mortgage previously given by him, and also the money thus advanced for the share of John. It is pressumed, though the answer does not so state, that the thirt

three acres thus alleged to have been conveyed to Elijah, ar=

a part of the premises mortgaged to the complainant.

executed to Elisha Warford a further mortgage upon a pa

of the premises for \$445.

The answer further alleges, that the release executed the mortgagor by his five sons, so far as it affects the interest of the defendant, was obtained by the false and fraudther representations of the father, and under a misappreson of his rights on the part of the son, and is there and under and void.

Hoff v. Burd et al.

Upon this complicated statement of facts, the defendant, Elijah Burd, asks a decree that his undivided four-sevenths of the mortgaged premises are exempt from the operation of the complainant's mortgage, and that the thirty three acres conveyed to him by Moses Burd, the mortgagor, shall not be sold to satisfy the mortgage debt, until the interest of the mortgagor in the residue of the premises, shall be first applied and prove insufficient for that purpose.

The case is heard upon the complainant's bill, and the answer of one defendant. As between the complainant and the defendant who answers, all the allegations of the answermust be taken as true. 2 Daniell's Ch. Pr. 1188.

The court, therefore, must proceed upon the assumption, that at the execution and delivery of the complainant's mortgage, the mortgager had no right, title, or interest whatever in the mortgaged premises, and no power or authority to execute the mortgage, but that the title was in other parties, of whom the answering defendant was one. This entitles the defendant to a decree of dismissal.

The defendant, however, is not content with this decree in his favor, but sets up new facts in order to establish equities in his favor against other parties. He alleges that the mortgagor, subsequently to the date of the complainant's mortgage, received a conveyance for the mortgaged premises. That as to the defendant, who was one of the grantors in that conveyance, the grant was void, though valid as to others of them, by means whereof the defendant acquired rights which he asks this court to establish. The defendant asks that the court establish his claim, upon a case made upon his own allegations, unsupported by evidence and not responsive to the charges of the bill.

The answer of one defendant is no evidence against a codefendant. 2 Daniell's Ch. Pr. 981. Much less can such answer avail a defendant, when not responsive to the charges of the bill, but designed to establish a case in favor of the defendant, not within the scope of the complainant's case.

An admission or allegation of fact in the answer, will not

Palmer v. Casperson et al.

avail the plaintiff, unless put in issue by the bill. Gresley's Eq. Ev. 23. The complainant's bill is silent as to any tit le acquired by the mortgagor, subsequent to the date of the mortgage. If the complainant had desired to avail himse If of this fact as set out in the answer, he should have amended his bill.

If the answering defendant had desired to reap the benefit of the facts upon which he seeks a decree to establish his claims, he should have filed a cross-bill. As the case stands, he is asking a decree entirely outside of any issue made by the pleadings.

So far as the case is within the issue, the evidence show so that the mortgage which the complainant seeks to enforce is null and void. So far as regards the case made by the an-swer, it is not within the issue, and is wholly unsupported by evidence. The bill must be dismissed without prejudice to the rights of the complainant.

ELIZA PALMER vs. John Casperson, executor of John C. Palmer, deceased, and others.

- 1. An injunction will not lie by a widow to restrain commission of waste or other invasions of her rights upon land sold subject to her dower. She has adequate remedy at law.
- 2. Courts of equity exercise concurrent jurisdiction with courts of law in the assignment of dower. But they will not decide whether the widow is legally entitled to dower.
- 3. If the title to dower is disputed, the right must be established at law. For this purpose the court may, and ordinarily will, either direct an issue or retain the bill, with liberty to the complainant to bring an action at law.
- 4. But whether, under such circumstances, the bill will or will not be retained, is a matter resting in the sound discretion of the court.

This case came before the court upon a motion to dissolve the injunction, which issued upon the filing of the bill.

Palmer v. Casperson et al.

Mr. Slape, for the executor, in support of the motion. Dower is a common law right. Harrison v. Eldridge, 2 Halst. R. 401; 2 Daniell's Chan. Prac. 1343; 4 Kent's Com. 72; Swaine v. Perine, 5 Johns. Ch. R. 488; Rockwell v. Morgan, 2 Beas. 384; Hartshorne v. Hartshorne, 1 Green's Ch. R. 349.

The widow has received \$200 from the estate, under a mistaken claim of right, which she refuses to account for, notwithstanding the claims of creditors. Before she asks equity, she must do equity. Nix. Dig. 270, § 16; 273, § 35; 274, § 38.

She is barred of dower by receiving \$200 as collateral Jones v. Powell, 6 Johns. Ch. R. 200.

If that is not a bar, she should pay back the \$200. executor wants her to have her dower.

He also cited Nix. Dig. 229, § 16; Stark v. Hunton, Saxton 224-7; Dillon v. Parker, 1 Swanst. 372; Mitchell v. Smart, 3 Atk. 607; Stevenson v. Brown, 3 Green's Ch. R. 503 ; Glen v. Fisher, 6 Johns. Ch. R. 35; Blake v. Dunbury, 1 Vesey 523; 4 Kent's Com. 57, notes and cases cited; Gowen et al., appellants, 32 Maine 516; Dundas v. Hitch-^{∞ck}, 12 Howard 256; Light v. Light, 9 Harris 407.

Ur. S. A. Allen, for complainant, contra.

The executor set off \$200. It was his own act—a gift. As to that, the testator died intestate. Hartshorne v. Hartshorne, 1 Green's Ch. R. 355.

Waste should be prevented. Dower should be assigned by the court.

THE CHANCELLOR. The bill is filed by the complainant as the widow of John C. Palmer, deceased, for the recovery of dower in the real estate whereof her husband died seized; or an injunction to restrain the conveyance of the said real estate, sold by virtue of an order of the Orphans Court of he county of Salem, for the payment of the debts of the hus- $V_{
m Or.~II.}$

Palmer v Casperson et al.

band; and also for an injunction against the purchasers, to restrain them from interfering with her rights.

So far as regards the injunction, it is clear that a sale by virtue of an order of the Orphans Court, cannot affect the widow's right of dower, if any she have. The sale is made subject to that right. The conveyance from the executo by the terms of the act, vests in the purchaser only the estate of which the husband was seized at the time of h is death. Nix. Dig. 764, § 17.

The charge of the bill that the lands were offered for sa 📜 🗲

clear of the encumbrance of the dower, if true in point of face could not affect the validity of the widow's claim for dowe nor her right to enforce it against the purchaser. But if the charge be at all material, its truth is fully denied by the argument. Nor is there any necessity for continuing the injunction against the purchasers, to restrain them from the commission of waste or other invasion of the complainant's right. If any attempt should be made by the purchasers to tree pass upon the property of the complainant, or to disturb he in the enjoyment of it, she has adequate remedy at lay. There is no ground for the continuance of the injunction.

It is well settled that courts of equity exercise a concurrent jurisdiction with courts of law in the assignment dower. I Story's Eq. Jur., § 624; 4 Kent's Com. 71 Hartshorne v. Hartshorne, 1 Green's Ch. R. 349; Swaine Perine, 5 Johns. Ch. R. 488. In many cases the exercis of the jurisdiction is absolutely essential to the ends of justice—Full and adequate remedy cannot be had at law. 1 Story Eq. Jur., § 632.

But a court of equity will not try a question of legal title—nor decide whether the widow is legally entitled to dower. If the title to dower is disputed, the right must be established at law. For this purpose the court may, and ordinarily will, either direct an issue or retain the bill, with libert to the complainant to bring an action at law. Mittord Plead., by Jeremy, 121; 4 Kent's Com. 71; Rockwell V-Morgan, 2 Beas. 384. But whether a court of equity will or

Palmer v. Casperson et al.

will not, under such circumstances, retain the bill, is a matter resting in the sound discretion of the court. I see nothing in this case, since the right to an injunction has been disposed of, calling for or justifying the interference of this court. Dower is strictly a common law right, and is properly cognizable in courts of common law. Harrison v. Eldridge, 2 Halst. R. 400.

Full and adequate redress may be had either in the courts of common law, or by application to the Orphans Court. The legal title to dower is in controversy, and must be set-The estate is of very small value, and must be greatly diminished, if not entirely consumed, to the prejudice alike of the widow and of the creditors of the deceased, by a controversy both at law and in equity. And although the principle is of universal application, that the widow's claim for dower is regarded with favor, nevertheless if she come into this court asking equity, she should be willing to do equity. The undisputed fact that she has already received from the estate of her husband, under a mistaken claim of right, a considerable amount of personal property for which she refuses to account, deprives her of all claim to be regarded with peculiar favor in the enforcement of her I think the ends of justice will not be prolegal rights. moted by retaining the case in this court.

The injunction is dissolved, and the bill dismissed with costs, without prejudice to the legal rights of the complainant.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW JERSEY,

FEBRUARY TERM, 1865.

EDWARD PRICE HUNT vs. JOHN AMBRUSTER.

- 1. The ordinance of the city of Camden, "authorizing and regulat in the erection and building of party walls," is not repugnant to the conflictution of the United States, or of this state. The land is not taken for public use.
- 2. Under that ordinance, the right to compensation for the use of a party wall enures not to the owner of the building at the time of its erection, but to the owner at the time the party wall is used for the purpose of building on the adjoining lot. It is not a personal claim of the grantor, but a right annexed to, and which passes with the ownership of the building to the grantee.

This was an application for an injunction. The case was heard upon the bill and answer.

Mr. P. L. Voorhees, for complainant,

The power to build party walls in the city of Camden conferred by city ordinance. The corporation has power pass by-laws, which become binding upon all the members the corporation. Willcock on Corp. 100, 105; Denning Roome, 6 Wend. 656; Sedgwick on Statutes 474.

The ordinances of a corporation are, like statutes, to have a reasonable construction. Sedgwick on Statutes 466; Will-cock on Corp. 159, 160.

The house was conveyed by the defendant, with the appurtenances, with all his claim and demand, with covenants of special warranty. There was no provision in the contract that the builder should be repaid half the cost of the wall, but that the owner of the building should be repaid by the owner of the lot adjoining. If a third party had made the improvement, Ambruster could have had no charge for the wall. 4 Greenleaf's Cruise 256, § 64; 2 Washburn on R. Prop. 468, § 12.

The grantor is estopped from setting up any claim which was in existence at the date of the grant. The deed conveys all the appurtenances. A party wall is an appurtenance. He is estopped by his covenant of warranty.

There is a series of decisions in Pennsylvania, apparently adverse. Ingles v. Bringhurst, 1 Dall. 341; Davids v. Harris, 9 Barr 501; Told v. Stokes, 10 Barr 155; Gilbert v. Drew, Ibid. 219. These decisions were made under the act of April 24th, 1721. Purdon's Dig. "Party Walls."

The language of that act is that the first builder should be re-imbursed. On the 10th of April, 1849, the law was changed so that the right of compensation should be taken to have passed to the purchaser. Bell v. Bronson, 5 Harris. 363. The act of 1721 provides that the first builder shall be re-imbursed. The act of 1849 provides that the right to compensation shall be deemed to pass to a purchaser, and the right shall exist in the owner. There is no exception or reservation in the deed. 2 Washburn on R. Prop. 640, § 57; 4 Greenleaf's Cruise 271, note.

He cited also Eno v. Del Vecchio, 4 Duer 53; 3 Kent's Com. 438, note.

Mr. G. M. Robeson, for defendant.

On the 25th of February, 1860, the defendant conveyed to plaintiff the lot and the dwelling thereon erected by the

Hunt " Amoraster.

grant in. He had estal lished a party wall, partly on his own lot. Sabsequently the grant in became seized of the adjointing lot, reviewing the increase of the foundation wall, and four and a half theres of the superstructure. On the 10th of January, 1863, Am mister parchased the adjoining lot, and

precession to use our and chalf melies of the wall.

The third was filed. It contains the resident for the use of the wall.

There is no precise of contract. The right of compensation loss to costs what the land. It is a mere personal right. There is no still right to common law, or by our statutes. Such right is so here, under the Code Napol of

The new mooners of femilia ways no anthorize to the

common control to analyze as much to occupy the land of anomals for its two pures so that it is much compensation to be so isolar. The winds seem of a chiteen is directed to matters of police toolate mediation of my afform. Councilmay to home two belongs to have one division wall, and present to its theorems. To never to occupy another's land minute be granted as application. Subgrook on Statutes 141-416. People of the real I What, 530: Baker v. City of Bestern. 12. The ISE Thirle v. City of Syranse, 13

Each S. J. E. 32.

The ordinance gives authority to take one man's property for the benefit of unstage, without compensation.

The books are fill of mass in regard to party walls, but except in Dinnsylvania, they all rist on agreement, or on agree of time from whom an agreement can be inferred.

Where I statute or an ordinance authorizes party walls to be built on the property of coether compensation must be provided or the act is uncoestic chonal. Solgical on Statutes will. The city marter, section organism, untherizes such ordinances only as are not regugnant to the laws of this state, or of the United States.

As to the limitation and grant of powers to manicipal

rporazione, see the language of the court in 13 Barb. 32.

As to personal right of compensation. Ingles v. Bringhurst, 1 Dallas 341; Burlock v. Peck, 2 Duer 90; Campbell v. Mesier, 4 Johns. Ch. R. 335; S. C., 6 Ibid. 21.

The right of compensation for building a party wall does not exist at common law. Sherred v. Cisco, 4 Sandf. S. C. R. 480.

THE CHANCELLOR. On the 25th of February, 1860, the defendant, by deed of bargain and sale, with covenant of special warranty, conveyed to the complainant a house and lot of land in the city of Camden. The description of the premises, so far as it is at all pertinent to the present inquiry, is as follows: "Beginning at the northeast corner of Third and Linden streets, and running thence easterly along the north line of Linden street twenty feet to a corner, in the centre of a party wall, built alike on other lands of the said John Am bruster as on the land herein conveyed, thence northerly and parallel with Third street aforesaid, along the centre of the said party wall, ninety feet to a corner." The deed is in usual form, conveying with the land all the improvements, rights, liberties, privileges, hereditaments, and appurtenances the reunto belonging or appertaining, and all the estate, right, title, interest, property, claim and demand of the grantor, of, in, or to the same. The house thus conveyed was erected by Ambruster, the grantor. The party wall was constructed Partly on his own lot, and partly on the adjoining lot, under the authority and pursuant to the provisions of an ordinance of the city "authorizing and regulating the erection and building of party walls." The ordinance provides that any Person erecting a building within the city of Camden, may construct the outer foundation walls thereof equally on his own land and on the land of the adjoining proprietor, according to the directions of the city surveyor; and that the owner of the building first erected, shall be re-imbursed one moiety of the value of such party wall, or so much thereof as the next builder or owner upon the adjoining lot shall have occasion to make use of, before such next builder or owner shall in any wise use or break into the same.

The recital in the deed, that the house was erected partly upon an adjoining lot of the grantor, is conceded to be a mistake. It is admitted that when the house was erected, and when the deed from Ambruster to Hunt was executed, the adjoining lot, upon which half of the party wall stands, was owned by a third party. Ambruster afterwards became the purchaser of that lot, and commenced the erection of a house upon it, breaking into and using the party wall for the purposes of his own building, before re-imbursing the complainant for any portion of the value of the wall.

To restrain the party from thus using the wall before making compensation, and to compel a compliance with the requirements of the ordinance, the bill was filed.

The party wall, as constructed by the defendant, rests half of its width, or four and a half inches, on the land conveyed to the complainant; the remaining half, on the land now owned by the defendant. The partition line between the lots, as defined in the deed to the complainant, runs through the centre of the wall. The legal title, therefore, to one half of the wall, and to the land upon which it stands, is in the complainant. The legal title to the other half of the wall, and to the land upon which it stands, is in the defendant. The half of the wall upon each lot is subject to certain easements in favor of the adjoining lot.

The defendant claims that as he conveyed to the complainant one half of the wall only, his right to the remaining half remains unimpaired. That by virtue of the ordinance, he, as owner of the lot conveyed to the complainant, became entitled to the remuneration provided for the use of the wall upon the adjoining lot. That the right to the remuneration was a personal right, which could not pass by the deed, and that his grantee could acquire no right to such remuneration by virtue of the grant. A personal claim of the grantor clearly will not pass by a grant of the land. The principle is fully recognized in the cases which have arisen under the statute of Pennsylvania, of the 24th of April, 1721. Purdon's Digest, "Party Walls." By that act, the right to re-

muneration was given to the builder of the house first erected. And it has uniformly been held to be a personal claim of the builder, which did not pass with the land to any subsequent owner. Davids v. Harris, 9 Barr 501; Todd v. Stokes, 10 Barr 155; Gilbert v. Drew, Ibid. 219; Bell v. Bronson, 5 Harris 363.

But, by the ordinance in question, the right to be re-imbursed for the value of the wall is given to the owner of the building first erected. The right enurs not to the owner of the building at the time of its erection, but to the owner at the time the party wall is used for the purpose of building on the adjoining lot. It is not a personal claim, but a right annexed to, and which passes with the ownership of the building. The right to the support of that part of the party wall standing on the adjoining lot, and to whatever other easements may exist as incident to the structure, passed by the deed as appurtenant to the land conveyed. The right to compensation for the use of the wall, also passed as an incident of ownership. Upon the execution of the deed, all the defendant's interest in the wall, and his right to compensation were determined. When he purchased the adjoining lot, he acquired the title, subject to the burden imposed by the ordinance.

It is objected that the city charter confers no power upon the common council to authorize one party to erect a wall upon the land of another, or to require the party whose land is thus occupied to make compensation for the use of such erection. The charter, in terms, authorizes the common council to pass ordinances "for authorizing the erection and building of partition or party walls and fences, and to regulate and govern the same." A party wall is a wall constructed upon the line of lands of two adjoining proprietors, and partly upon each, or it may be that the wall and the land upon which it stands are held in common. Where, however, a party wall is to be newly erected upon the lands of adjoining proprietors, each proprietor is the owner of so much of the wall as stands upon his own

land. The power to authorize the erection of such wall necessarily involves the power of authorizing its construction upon the application of either proprietor, with or without the consent of the adjoining proprietor. Without it, the authority is nugatory. The grant of power to accomplish a specified object includes, by necessary implication, all powers requisite to effect that object.

The ordinance is not repugnant to the constitution of the United States, or of this state, because compensation is not provided for the land occupied by the wall. The land is not taken for public use, and, therefore, not within the terms or meaning of the constitution. The land is not taken from the owner in any sense. It remains his, together with the wall constructed upon it. If he use it, or any part of it, for building purposes, he is required to pay the adjoining owner a moiety of the cost of the portion so used. The ordinance, for purposes deemed equally advantageous to both the adjoining proprietors, and beneficial to the corporation at large, imposes a burden upon the land. The proprietor of the land thus burdened, in contemplation of law, receives an equivalent in the corresponding easement which he enjoys in the land of the adjoining proprietor.

Eimilar laws have existed from a very early period in England and in this country, and they have been regarded not as unauthorized violations of the property or rights of the citizen, but rather as reasonable and useful regulations, and as evidences of a vigilant and civilized police. Statute 14, Gro. 3, ch. 78; Purdon's Digest, "Party Walls;" Statof Penn., April 24, 1721; 3 Kent's Com. 438, note a; Ingles v. Bringhurst, 1 Dall. 345.

The complainant is entitled to a decree.

Dewitt v. Ackerman et al.

JOHN P. DEWITT vs. RICHARD H. ACKERMAN and others.

- 1. A bill for partition will not lie where the title is denied, or depends on doubtful facts or questions of law.
- 2. Where, upon a bill for partition, the title is denied, equity may retain the suit to give the complainant an opportunity to establish his title at law. But there is no room for the exercise of the power, where the defendant has established a valid title to the premises in dispute.

Mr. Barkalow, for complainant.

Mr. Hopper and Mr. Woodruff, for defendants.

THE CHANCELLOR. The bill is filed for the partition of two lots of land in the county of Passaic. The complainant claims title to a share of an equal undivided half part of the land, under the will of Elizabeth Dewitt. At the date of the will, the land was subject to a mortgage, which was subsequently foreclosed. Both lots were sold by virtue of an execution, issued upon the decree. The purchaser at the sheriff's sale conveyed the entire premises to Richard H. Ackerman, one of the defendants, who is in possession, claim-The only question in controversy between the Parties is, whether the mortgage covered the whole, or only an undivided half of the lands devised. It is not denied that the sheriff's deed, and the subsequent deed to Ackerman, covered the whole of the land,

This is not a proper case for partition. The defendant is in possession, claiming title, and under color of a deed covering the entire premises. A bill for partition will not lie where the title is denied, or depends on doubtful facts or questions of law. Manners v. Manners, 1 Green's Ch. R. 384; Van Riper v. Berdan, 2 Green's R. 132; Wilkin v. Wilkin, 1 Johns. Ch. R. 111; Coxe v. Smith, 4 Johns. Ch. R. 271; 2 Barb. Ch. Pr. 285.

Wilson v. Wood.

Where the title is denied, the court may retain the bill to give the party an opportunity to establish his title at law. But this course would not avail the complainant in the present case. The decree and the execution in the foreclosure suit authorized the sale of the entire premises. The title of Ackerman is, therefore, unquestionably valid at law. The real point of the controversy is, whether the mortgage covered the entire premises; and whether the decree and execution were, in fact, warranted by the terms of the mortgage. As the evidence has been taken in full, and the question involved submitted for the decision of the court without objection by either party, it may be proper, to save further controversy, to state that I see no ground upon which the complainant can, in any form of proceeding, establish his claim to relief. Independently of the parol evidence, the terms of the mortgage are sufficiently broad to cover the entire premises, and to warrant the execution and the sale as made by the sheriff.

The bill must be dismissed.

JACOB WILSON vs. CHARLES B. WOOD.

- 1. Upon a contract for the conveyance of real estate by deed with "usual covenants," the grantee is entitled to covenants of seisin, of right to couvey, against encumbrances, of quiet enjoyment, and of warranty.
- 2. "What are usual covenants in deeds in a given locality" may be referred to a master.

Mr. Ogden, for complainant.

The deed tendered by defendant was defective for want of metes and bounds in the description. It was unintelligible, and lacked certainty.

It contained no other covenant but that of warranty. The contract was for usual covenants. Covenants, in the plural, necessarily imply more covenants than one. The clause,

Wilson v. Wood.

"usual covenants," includes four distinct covenants. 1. Covenant of seizin. 2. Of the grantor's right to convey. 3. Against encumbrances. 4. Covenant of warranty. 2 Sug. on Ven. (7th Am. ed.) 701; 2 Hilliard on Real Prop., ch. 86, p. 393, § 59; Ibid. 399, § 94; 4 Kent's Com. 471.

Mr. Leupp, for defendant.

The deed contained the covenant of warranty, which is the usual covenant in all deeds, and will be regarded as sufficient where the title on record is satisfactory to the counsel. It is admitted that the title is perfect and without flaw. It has been examined by the complainant's counsel, and found perfectly satisfactory.

Every covenant must receive the same construction in every court; it must be construed according to the true intent and meaning of the parties. Courts will not confine themselves within the narrow limits of a literal interpretation, but will take a more liberal view, and look at the whole scope and object of the deed. 2 Parsons on Con. (2d ed.) 11, 17; Platt on Cov. 136.

And the contract is to be interpreted by the same rules in all courts, both of law and equity. The intent of the parties is of paramount influence in the interpretation of the contract. 4 Kent's Com. 472; Chapman v. Holmes, 5 Halst. R. 30, 34; Moore v. Rake, 2 Dutcher 574.

There will be no extension of the contract against the grantor. The doctrine of the construction of the deed being most strongly against the grantor, is not of universal application. A doubt will always be resolved in favor of the obligor. 2 Parsons on Con. 22; Shep. Touch. 375, 380.

THE CHANCELLOR. The bill is filed by the purchaser against the vendor, to compel the specific performance of a contract for the sale and conveyance of real estate. By the terms of the contract, the conveyance was to be "by deed with usual covenants." The deed tendered, contained only the covenant of general warranty. This the purchaser Vol. II.

Wilson v. Wood.

refused to accept, upon the ground that it was not a compliance with the terms of the agreement. The counsel of the purchaser thereupon prepared, and submitted to the vendor to be executed, a deed containing (in addition to the covenant of general warranty) covenants of seizin, of right to convey, and against encumbrances. This the grantor refused to execute.

The only question is, what are "usual covenants" in a deed of bargain and sale of a fee simple estate.

The usual personal covenants inserted in a conveyance in fee, as stated by Chancellor Kent, are: 1. That the granter is lawfully seized. 2. That he has a good right to convey. 3. That the land is free from encumbrances. 4. That the grantee shall quietly enjoy. 5. That the grantor will warr int and defend the title against all lawful claims. 4 Kent's Com. 471.

The authorities agree that all these covenants, except the last, are usual covenants in a conveyance of the fee. In lieu of the covenant of warranty, the usual covenant in England is a covenant for further assurance. 2 Sugden on Vendors (7th Amer. ed.) 701, ch. 13, sec. 3, § 2; 4 Cruise's Dig. 459, title 32, "Deed," chap. 25, § 47, § 62; Ibid. (Greenleaf's ed.), title 32, "Deed," chap. 26, § 47; Rawle on Cor. (3d ed.) 11.

It is material to observe that the question is not what c venants, in the absence of a special agreement for covenants, the vendor is obliged to give, and the purchaser has a right to demand. The character of the deed to which the complainant is entitled, depends upon the language of his agreement, which is to convey "by deed with usual corenants."

If the defendant intended to rely upon a well settled local usage, by the aid of which his contract was to be interpreted, it was incumbent upon him to show it. No such attempt is made, either in his answer or by the evidence. On the contrary, the defendant, in his answer, relies upon the true construction to be given to the terms of his agreement. It is shown, moreover, by two of the complainant's witnesses,

that the deed which the defendant was requested to execute, contained the usual covenants.

Upon an agreement for "usual covenants" in a lease, owing to the great variety of local usages respecting the terms of leases, it is sometimes referred to a master to inquire what are usual covenants. Henderson v. Hay, 3 Bro. Ch. R. 532, note; Boardman v. Mostyn, 6 Vesey 467; 1 Hovenden's Sup. 616.

And where a controversy arises as to what are the usual covenants in deeds in a given locality, the same practice may perhaps with propriety be adopted. But upon the pleadings and proofs in this case, I see no propriety in such reference.

The complainant is entitled to a decree.

EDMUND BREWER vs. URIAH NORCROSS.

- 1. The general rule in equity, as well as at law, is that joint and separate debts, or debts accruing in different rights, cannot be set off against each other. But, wherever it is necessary to effect a clear equity, or to prevent irremediable injustice, the set-off will be allowed, though the debts are not matter.
- 2. In cases of insolvency, or of joint credit given on account of individual indebtedness, or where the joint debt is a mere security for the separate debt of the principal, the equity is obvious, and the set-off will be allowed.
- 3. Upon a bill between partners for an account of the partnership transactions, an allegation of the answer that a third party is a joint partner with the complainant and defendant, and therefore a necessary party to the suit, can not be assumed to be true, at the hearing upon exceptions to the answer.
- 4. Upon a bill filed to settle the accounts of one partnership, a settlement of the accounts of another and different partnership cannot be effected upon the defendant's answer. The remedy is by cross-bill.

This case came before the court upon an appeal by the defendant from a report of the master on exceptions to the answer.

Mr. J. Wilson, for defendant, in support of the answer.

The defendant sets up in his answer, farming transactions and an individual account between the parties. exception is that these matters cannot be introduced. decision in the cause should be a final settlement, on examination of all accounts between them. The firm was really There is no alclosed when the mail contracts terminated. legation of debts due from the firm. No suggestion in behalf of oreditors. No charge of concealment of funds. is not a bill by or against the partnership, but by an individual partner against a co-partner, for the settlement of cross demands, which being settled, he prays that the balance found due may be paid over to him. The decree will be to pay over the debt found due by one partner to the other. What the defendant wishes is, that if a balance is found due from him on the partnership account, he may at the same time show individual indebtedness from the complainant to him.

Assumpsit would lie at common law, by one partner against another, for a balance admitted on an express promise to pay it. Gulick v. Gulick, 2 Green's R. 578; Jessup v. Cook, 1 Halst. R. 434; Gow on Part. 74. In that action, individual accounts may be set off.

Equity exercises its jurisdiction and powers in such a way as will best attain the ends of justice. It does not derive its jurisdiction from the statutes of set-off. It proceeds on different principles, and in different forms, from a court of law. 2 Story's Eq. Jur., § 1435-7. In cases of insolvency it will allow a set-off when not otherwise admissible. Simpson v. Hart, 14 Johns. R. 63; Nelson v. Hill, 5 Howard 127.

Where one partner dies, neither his representatives nor the survivor may go into equity for an account, and join the surviving partner and the representatives of the deceased partner. The creditors of both firms may unite. Blake v. Langdon, 19 Vt. 485, 492-4.

As to the partnership respecting the farm. The parties owned the farm all the time that the partnership in the stages

continued; the farming and staging were connected. The produce of the farm was taken to feed the stage horses; the manure from the stable was taken to the farm. These are the allegations of the answer, and they must be taken as true. It may be objected that the relief should be by cross-bill, but we should then be met by the objection that there was no equity in our bill. Is it not just as well to bring the matter before the court by our answer? It is mere matter of form. Ayliffe v. Murray, 2 Atk. 59; Story's Eq. Pl., § 389, 393-5.

Recent legislation has rendered a cross-bill unnecessary. The defendant himself may be a witness, and may exhibit interrogatories to the complainant. All the ends of justice may be fully attained as the pleadings now stand. Why resort either to a cross-bill, or to a suit at law? Ames v. N. J. Franklinite Co., 1 Beas. 66.

The court ought not to encourage the filing of cross-bills; it increases expense and involves delay.

Mr. G. M. Robeson, for complainant, contra.

The complainant's bill is simply a bill for an account of partnership transactions. The complainant is entitled to come into equity, because he is a partner. He annexes to his bill a detailed account of the partnership transactions.

The answer alleges that about eleven years ago, i. e., two years before the commencement of the partnership set out in the bill, that there were other transactions between the parties; that they owned a farm in Delaware, not where the stage routes are. It is not pretended that it was bought in reference to the stage business, or that it was kept or carried on for the benefit of the staging. All the allegation is that the defendant is informed and believes that the manure from the stage stables was used on the farm. No connection is shown, nor is the process described by which the operations of the farm and the staging become united.

This is in no way responsive to the bill. It is no answer to any allegation contained in the bill. If true, it is imperti-

nent. The matter set up by the answer should be such as should be taken into consideration in the original case, or proper to be taken into account in making a settlement of the matter contained in the bill. It is entirely unnecessary to a full settlement and understanding of the affairs of the partnership.

So far as appears upon the answer, the investigation of the affairs of the firm is totally irrelevant to the matter of the bill, and in no way material to the investigation of the matters charged in the bill. 2 Daniell's Ch. Pr. 838, note 1; Hood v. Inman, 4 Johns. Ch. R. 437; Woods v. Morrell. 1 Johns. Ch. R. 103. The test of its relevancy is whether the subject of the allegation can be put in issue, and given in testimony between the parties in the cause. Story's Eq. Pl., § 268; Wood v. Mann, 1 Sumner's R. 578.

These matters could not have been joined together or set up in connection in a bill of complaint. It would have made the bill multifarious. Whatever would make a bill multifarious would be impertinent in an answer, unless upon some special ground of equity. 1 Daniell's Ch. Pr. 384, note: Story's Eq. Pl., § 271; Swift v. Eckford, 6 Paige 22; Boyd v. Hoyt, 5 Ibid. 65.

The subject matter, the nature of the interest, and the parties, are all different and incapable of being united. No reason is found in the answer why these different matters should be united. 3 Daniell's Ch. Pr. 1742; Troup v. Haight, Hopk. Ch. R. 270.

These matters, if at all material or relevant to the matter in issue, should be introduced by cross-bill. The equity should be spread out upon the face of the bill. If the complainant is found indebted on the individual account, how is the defendant to recover? But how can matters so totally distinct be set up even by cross-bill? Story's Eq. Pl., § 389, 401; Daniel v. Morrison's Ex'r, 6 Dana 182.

The matters are set up in the answer as an equitable setoff. The mere existence of cross demands is not a sufficient ground of set-off. 2 Story's Eq. Jur., § 1436, 1437 a; Blake Langdon, 19 Vt. 485.

Every case cited by Judge Redfield in Blake v. Langdon, is a case of bankruptcy.

The fifth exception relates to an individual account barred by the statute of limitations. It so appears on the face of the schedule. This has no relation to the partnership accounts. It is a mere claim at law having no equity. We can take no issue on the matter. It clearly should be set up by bill. Story's Eq. Pl., § 280; 1 Daniell's Ch Pr. 386.

I have proceeded on the ground that George Brewer is in fact a partner; upon that, the whole case rests. For the purposes of this case and upon this issue, that fact does not judicially appear. They may show by their answer that George Brewer is a necessary party, but they can have no benefit from that till the right is established. If they want the benefit of it before hearing, it must be set up by plea. Affirmative matter set up in answer will not be presumed to be true. 1 Barb. Ch. Pr. 109; Dodge v. Perkins, 4 Mason 435; Wood v. Mann, 1 Sumner 578.

Mr. A. Browning, on the same side.

The bill is for the settlement of a partnership account. The answer is purely defensive, either by way of denial or of avoidance. Outside of matters of denial or of avoidance, matters, to give the court jurisdiction, must be set up by way of cross-bill, in order that the plaintiff may have an opportunity of answering. Blending different matters in the same suit, is as objectionable in equity as at law. Story's Eq. Pl., § 863; 2 Daniell's Ch. Pr. 838.

The two matters of the mail contract and the farming business are essentially distinct and separate, unless by agreement they have been so mingled as of necessity to be settled together, or by transactions which imply an agreement, are so blended that they cannot be settled separately. But the fact of their being so blended or complicated cannot be set up in the answer. It must be by cross-bill, in order that the complainant may have an opportunity of answering. Story's Eq. Pl., § 389, 390; 3 Daniell's Ch. Pr. 1742; White v. Buloid, 2 Paige 164.

If the want of proper parties appear upon the face of the bill, the objection should be by demurrer. If it does not appear, it may be brought out by plea or answer, or upon the facts stated in a cross-bill. Story's Eq. Pl., § 237.

Mr. Carpenter, in reply.

It is clear that the objection for want of proper parties may be made by answer. If the facts stated in the answer show clearly that the brother of the complainant is a necessary party to a full investigation and settlement of the matters involved in the bill, the court will cause him to be made a defendant.

All matters necessary to the investigation of the whole subject matter of controversy are proper to be stated in the answer. If the statements of the answer blending different transactions, however distinct and separate in themselves, are pertinent and material to the defense, they are properly united in the answer. The question is not whether they must necessarily be examined together, but whether they are so related that they may be properly, and without confusion or embarrassment, examined in the same suit.

No discovery is sought, which alone renders a cross-bill necessary. As to the individual accounts of the parties, which are introduced by the answer, they may or may not prove to be material and pertinent to the defense. They should not be stricken out summarily upon exceptions, but should stand till the evidence is taken.

THE CHANCELLOR. The bill is filed by one partner against his co-partner, for an account of the partnership transactions in the business of running stages and carrying the mail, under contracts with the government of the United States, from the first of July, 1852, to the 30th of June, 1856.

The defendant, by his answer, claims that there are monies due to him from the complainant on various accounts, of which he asks a settlement; and that the amounts found

due may be allowed by way of set-off to the demand of the complainant, if anything shall be found due to him.

The complainant excepts to the answer. The exceptions relate to so much of the answer as asks to set off the amounts claimed to be due from the complainant to the defendant.

- 1. On account of a farm of which the complainant, the defendant, and one George Brewer were joint and equal owners, and which was occupied and managed by the complainant for the use and benefit of the joint owners.
- 2. For mules and harness belonging jointly to the parties, complainant and defendant, and the said George Brewer, which were sold, and the price therefor received by the complainant.
- 3. For an account of the defendant against the complainant in his individual capacity.
- 4. For an individual account of the defendant against George Brewer.

The several matters thus set up by way of defense, have no natural or necessary connection with the subject matter of the bill. They are in themselves entirely distinct and unconnected. If they were united in the same bill, it would constitute the vice of multifariousness. A claim against two or more defendants cannot be properly united in the same bill, with a separate claim against one only. Nor can distinct claims against two or more defendants, upon individual accounts, be thus joined. 1 Daniell's Ch. Pr. 383; Story's Eq. Pl., § 271.

The bill is filed for the sole purpose of effecting a settlement of the partnership accounts of the complainant and defendant in a specified business. The allegation that the parties were engaged in other transactions with third persons, or with each other, either as partners, or on their individual accounts, is impertinent to the matter of the suit.

The general rule in equity, as well as at law, is, that joint and separate debts, or debts accruing in different rights, cannot be set off against each other. At law, under the statutes of set-off, the rule is inflexible; but in equity, spe-

cial circumstances give rise to exceptions. Courts of equity exercise a jurisdiction in matters of set-off, independent of the statutes upon the subject. They look beyond the form of the contract, to its real character; and beyond the nominal parties, to the parties to be affected by the decree. Wherever it is necessary to effect a clear equity, or to prevent irremediable injustice, the set-off will be allowed, though the debts are not mutual. Vulliamy v. Noble, 3 Mer. 618; Dale v. Cooke, 4 Johns. Ch. R. 13; Blake v. Langdon, 19 Vt. 494; 2 Story's Eq. Jur., § 1437; Receivers v. Paterson Gas light Co., 3 Zab. 283.

In cases of insolvency, or of joint credit given on account of individual indebtedness, or where the joint debt is a mere security for the separate debt of the principal, the equity is obvious, and the set-off will be allowed.

I do not perceive that any equitable ground for allowing the set-off is disclosed by the answer. Insolvency or danger of irremediable loss is not suggested.

One of the allegations of the answer is, that George Brewer was a joint partner with the complainant and the defendant in the staging business as well as in the farm, and that he is, therefore, a necessary party to the suit. It is clear, that at this stage of the cause, the court cannot act on the assumption that this allegation is true. If the fact should be established in evidence, the bill is clearly defective. the bill should be amended, the defendant will have a right to answer the amended bill, and to avail himself of any equitable defence to which such new state of facts may entitle him. A set-off of the individual account against George Brewer can have no possible foundation, if he be not a necessary party to the bill. Nor is there ground suggested for a set-off of the individual indebtedness of the complainant to the defendant.

The only plausible grounds stated in the answer, upon which the right of equitable set-off can be made to rest, are, that the same parties were interested as partners in both partnerships, and that the defendant believes that the business of both

rms was so connected and blended, that justice requires hat the accounts of both partnerships should be inquired nto and settled at one and the same time. The only reason ssigned for this belief of the defendant is his hearing and elief, that the products of the farm were taken for the see of the horses upon the stage route, and that manure rom the stables of the stage company was used upon the arm. Now the facts alleged create no necessity for the settlement of the accounts of both firms at the same time. Nor an the court act upon the general allegation on the part of he defendant, of his belief in the existence of such necessity. The facts upon which such allegation is founded, should be clearly and distinctly set forth.

Nor can the defendant have this relief by way of answer. It must be, if at all, by original bill. He is not asking, upon equitable grounds, the mere right of setting off one indebtedness against another. But, upon a bill filed to settle the accounts of one partnership, he asks that there should at the same time be a settlement of the account of another and different partnership. If the balance upon the settlement of the account, in respect to which the bill is filed, should prove to be in favor of the complainant, but upon the settlement of both accounts, the balance should be in favor of the deemdant, what remedy could he have, or what decree could be pronounced upon the pleadings as they stand? If, in this aspect of the case, the defendant has any equity, he can have relief only by way of cross-bill.

I think all the exceptions to the answer are well taken, and must be sustained.

CHARLES M. LANNING vs. THE ADMINISTRATOR OF JOHN V. LANNING.

1. A executed to B an assignment of two bonds and mortgages, amounting to about \$1300, in trust to collect the moneys due thereon, and after satisfying certain claims against A, to pay out of said money to C a debt of \$1231, with interest, and to pay the surplus, if any, to the complainant. A afterwards filed a bill to set aside the assignment in favor of C, on the ground that there was no debt due to him; that the notes which constituted the pretended indebtedness were given without consideration, and with a view to the creation of the trust; and that the real consideration of the assignment in favor of C was an agreement by him to maintain the complainant during life. The evidence corroborated the allegations of the bill. C refused to execute the agreement on his part. He resists the bill, and attempts to enforce the execution of the trust. Held—

First. The trust in favor of C is inoperative and void.

Second. So much of the trust money as has been paid to C must be refunded.

Third. The balance of the fund in the hands of the trustee, after a proper allowance for his services, must be paid to A, and the notes surrendered to him.

- 2. Under the proviso of the act of 1859, (Nix. Dig. 928, § 34.) if either of the parties die before the testimony on either side is taken, the evidence of the survivor is inadmissible.
- 3. But, by the act of 1851, (Nix. Dig. 228, § 27.) the complainant in any action of an equitable nature, is a competent witness to disprove so much of the defendant's answer as may be responsive to the allegations of the bill, even after the death of the defendant. The act of 1859 does not repeal this provision.
- 4. The enacting clause of the act of 1859 was designed to authorize the examination of parties to the record in cases in which their evidence was proviously admissible. The operation of the proviso must be limited to the cases in which the parties were rendered competent by the enacting clause.

On the 23d of December, 1861, the complainant executed to a trustee, an assignment of two bonds and mortgages, amounting to about \$1300, in trust to collect the moneys due thereon, and after satisfying claims against the complainant amounting to \$78.50, to pay out of said moneys, unto John V. Lanning, a brother of the complainant, a debt of \$1231,

with interest, and to pay the surplus, if any, to the complainant.

The bill seeks to set aside the assignment in favor of John V. Lanning, on the ground that there was, in fact, no debt due to him. That the notes which constituted the pretended indebtedness were given without consideration, and with a view to the creation of the trust. That the real consideration of the assignment, and the sole purpose of the trust in his favor, was an agreement and undertaking on his part, that he would take the complainant into his family, and would clothe, board, and lodge him, during life, for the sum of \$1231, so assigned in trust for him. And that previous to the execution of the assignment, the defendant promised to execute a bond to secure such support and maintenance, which he afterwards refused to execute, or in any wise to fulfill the contract on his part.

The answer denies fully the charges of the bill, and alleges that the trust was created for the satisfaction of a debt of \$1231, due from the complainant to the defendant, as stated in the assignment.

Mr. Strong, for complainant.

Mr. E. W. Scudder, for defendant.

THE CHANCELLOR. The main issue between the parties is a question of fact, viz. whether the trust was in fact created to secure a previous indebtedness, or whether it was designed to transfer the complainant's property to his brother, in consideration of his undertaking to maintain the complainant for the residue of his life. There is direct evidence, on the part of the complainant, of repeated declarations made by the defendant to different witnesses, at different times after the creation of the trust, that the complainant owed him nothing, and that he was to keep him for his property as long as he lived. The parol testimony upon this point is strongly conflicting. It comes, upon both sides,

principally from the lips of interested witnesses. Standing alone, it is not sufficiently clear or decisive to overcome the documentary evidence in support of the defendant's case. But the clear and decisive weight of the mass of circumstantial evidence in the cause is with the complainant. It is unnecessary to examine the evidence in detail. A reference to a few of the leading facts established by the evidence, will be sufficient to justify the conclusion, and exhibit the grounds upon which it rests.

The alleged debt was about equal to the entire property of the complainant, which the bill alleges it was the design of the assignment to transfer as the consideration of the complainant's maintenance. The assignment was cotemporaneous with the complainant's going to live with the de-The complainant went to live with his brother on the 20th of December, 1861. The assignment is dated and acknowledged on the 23d of December. But the trustee by whom the assignment was drawn, testifies that when the parties first came to him, the complainant was so much intoxicated that he refused to prepare the papers; that they called again two or three days afterwards, when the assignment was drawn and executed. This shows that the agreement by the complainant to transfer his property to his brother, was made at the time that he became a member of his brother's family.

There had been a previous separation between the complainant and his wife, when the complainant, after securing a part of his property to his wife, conveyed the land which constituted the residue of his estate, by an absolute conveyance, to his brother. This deed, though absolute upon its face, was designed as a trust for the grantor. For some cause, this conveyance did not take effect. The complainant subsequently sold the land, received the mortgages for the pur hase money, and by the assignment now in question, transferred those mortgages to his brother.

There is no satisfactory evidence, aside from the notes temperatures, of any subsisting indebtedness from the com-

plainant to his brother at the date of the assignment; nor is there anything in the evidence that gives the least color or probability to the existence of such indebtedness. The parties were both laboring men of very moderate means, dependent mainly upon their personal industry for their support. No reason is apparent, nor is any suggested, why so large loans should have been made by the complainant, or why the defendant should have been willing to trust the complainant to the extent of the whole value of his property, without security of any kind. The complainant was intemperate in his habits, and there was nothing in the circumstances, habits of intercourse, or relations of the parties, which rendered such a loan in the least degree probable.

The production of the notes adds no strength to the case, on the part of the defendant. Aside from their dates, they afford no evidence of their previous existence, or that conflicts with the allegations of the complainant's bill, that they were manufactured for the purpose of giving color and apparent validity to the assignment of the complainant's property, without disclosing the real design of the trust.

The notes are both in the handwriting of the payee, and though written on different paper, differing in form and phraseology, and varying in dates nearly two years, the signatures appear to have been made with the same pen and the same ink. Both notes are payable on demand, with interest. The first note is dated May 1st, 1857, for \$600; the second note is dated April 2d, 1859, for \$400. The assignment was executed on the 23d of December, 1861, nearly five years after the date of the first note; and yet not one dollar of interest is credited or pretended to have been paid upon either note. No security for the debt was ever given or required.

Upon the whole evidence, I entertain no doubt that the account given of this transaction by the complainant, in his bill and in his evidence, is in accordance with the truth and the facts of the case. There was no subsisting indebtedness from the complainant to his brother, prior to the creation of the trust. The assignment of the complainant's property

was made, and the trust created, as a consideration for an undertaking, upon the part of the defendant, to maintain the complainant for the residue of his life. That undertaking on his part, the defendant refused to execute. His death, and the condition of his estate, render a specific performance of the contract on his part impracticable. The attempt of the defendant to enforce the execution of the trust, according to the terms of the written instrument, is fraudulent. The trust in favor of John V. Lanning must be declared inoperative and void. So much of the trust money as has been paid to him must be refunded. The balance of the fund in the hands of the trustee, after a proper allowance for his services, must be paid to the complainant, and the promissory notes must be surrendered to him.

The claim for the watch, and the money lent by the complainant to the defendant, are not proper subjects of relief in equity. The appropriate remedy is in a court of law. where adequate relief may be had. A decree will be made accordingly.

Upon the hearing, a question was raised as to the competency of the complainant's evidence, which it is proper should be settled; although, in my judgment, the admission or rejection of that evidence will in no wise vary the result. or materially affect the preponderance of the testimony in the complainant's favor.

After the filing of the bill, and before the taking of the testimony, the defendant died, and the suit has been continued against his administrator. It is objected that the complainant is not a competent witness, inasmuch as the suit is against the defendant in a representative capacity. The proviso of the act of 1859, (Nix. Dig. 928, § 34,) is that no party shall "be sworn in any case, when the opposite party is prohibited by any legal disability from being sworn as a witness, or either of the parties in a cause sue or are sued in a representative capacity." The design of the enactment obviously is, that neither of the parties shall be admitted to

testify, unless both can be heard. It is immaterial whether the suit is originally instituted by or against a party in his representative capacity, or whether, by reason of the death of one of the parties, it is revived or continued by or against his representatives. In either event, if the death occur before the testimony on either side is taken, the evidence of the survivor is inadmissible. If the death occur after one of the parties has been examined, questions may arise more difficult of solution, but which are not involved in the present case. The evidence is inadmissible under the act of 1859.

But, by the act of 1851, (Nix. Dig. 928, § 27,) it is enacted that the complainant or petitioner, in any action or proceeding of an equitable nature, in any court, shall be a competent witness to disprove so much of the defendant's answer as may be responsive to the allegations contained in the bill of complaint or petition. To this extent, and no further, the complainant's evidence is competent.

The provision is not repealed by the act of 1859, either expressly, or by necessary implication. It is true the language of the proviso is very broad, and in terms, does extend to the case provided for by the act of 1851. It proyides that no party shall be sworn in any case when the opposite party is prohibited by any legal disability from being sworn as a witness, or either of the parties in the cause sue or are sued in a representative capacity. This language, taken literally, would exclude parties to the record from being sworn in the cause for any purpose whatever. But this could not have been the intention of the legislature. Parties, both at law and in equity, are sworn for various purposes in the progress of a suit. And upon the trial of a cause, they are competent witnesses to prove the loss of a paper, and other facts which rest peculiarly and exclusively within their own knowledge. 1 Greenl. Ev., § 348-9. It has never been supposed that the act can operate to render the testimony of parties incompetent for these and similar purposes.

The broad language of the proviso must have a limita-

tion. It must be limited, I conceive, to the cases in which the parties were rendered competent by the previous clause of the act. The proviso is simply a limitation of, or conditionannexed to, the power conferred by the statute. In the absence of a clearly expressed intention to the contrary, it extends to those cases only which are within the purview of the statute. The proviso of a statute is generally intended to restrain the enacting clause and to except something which would otherwise have been within it, or, in some measure, to modify the enacting clause. It is a limitation of, or exception to, the authority conferred. Wayman v-Southard, 10 Wheat. 30; Voorhees v. Bank of United States, 10 Peters 449.

The enacting clause of the act of 1859 was designed to authorize the examination of parties to the record, in cases in which their evidence was not previously admissible. It had no reference to cases in which the parties were already competent witnesses. The operation of the proviso must be limited accordingly.

DANIEL H. LAWRENCE. JAMES N. GRIGGS, and JOHN A. KINGSBERRY, partners, vs. EMELINE H. FINCH.

- 1. Where a husband, in the transaction of his own business, assumes to deal in his wife's name, and upon the credit of her estate, her knowledge of the fact will not operate to charge her with participation in the fraud nor her estate with liability for the indebtedness. So long as she abstains from active co-operation with him, her silence can raise no presumption that he acted as her agent, or by her authority.
- 2. In order to charge the separate estate of the wife for debts contracted by the husband in his business, there must be clear and unequivocal evidence of her assent to that arrangement.
- 3. It is not necessary that the return should show that the officer before whom the commissioner was sworn, was duly authorized to administer as each in the state where the commission was executed. All that the court requires is competent evidence of the authority of the officer to administer the eath.

- 4. It is no objection to the evidence of a non-resident witness, taken by virtue of a commission, that the witness is dead.
- 5. An oath by a commissioner to take depositions in a foreign state, "truly, faithfully, and without partiality, to take the examinations and depositions, &c.," is a material departure from the requirements of the statute, and the testimony taken before such commissioner is inadmissible.
 - 6. Duties of commissioners defined.
- 7. It is necessary to the admissibility of testimony taken before a commissioner, to show that all the requirements of the statute have been complied with.

Mr. Flemming, for complainants.

Mr. Bedle, for defendant.

THE CHANCELLOR. The bill is filed to recover from the separate estate of a married woman, the balance of an account for goods, wares, and merchandise, sold and delivered. At the time of the transactions which form the subject of controversy, the complainants were wholesale merchants in the city of New York; the defendant was the wife of George Finch, a resident of Red Bank, in this state.

The bill charges that the defendant, by herself and by her agent, George Finch, called at the complainant's store, and desired to purchase goods on credit, representing that by the death of her father she had become possessed of a valuable property, and that she also owned other real estate as her sole and separate property. That she was carrying on business in her own name and for her own account, and that in reference to her sole and separate property, and upon the faith and credit thereof, she desired to purchase goods of the complainants. That, relying on the faith and credit of her separate property, the complainants sold to the defen lant a large amount of merchandise, and that payments were made from time to time by the defendant on account, but that a balance of the account still remains unpaid, which the complainants seek to recover.

The bill further charges that a large part of the goods

were delivered upon written orders, signed by the defendant, and were forwarded to her; that before and at the time the purchases were made, the defendant was carrying on business in her own name and for her own account; that her husband acted therein only as her agent, and that she assented to and ratified his acts as such; that upon her making the purchases, the defendant declared and made the indebtedness a lien and charge pon her separate property, and after the indebtedness was contracted, she frequently promised to pay it. The complainants ask the aid of the court, to obtain payment of the debt out of the separate property of the wife.

The defendant's answer fully denies all the material allegations of the bill relating to her liability for the debt.

The case made by the bill is not sustained by the evidence. The business was not carried on by the wife, but by the husband, in his own name and for his own benefit, she being with him and assisting him in the business. It is not shown that credit was obtained in the name of the wife, or upon the credit of her estate, at her request, or by her authority. The fact appears to be, that the account was originally opened in the wife's name before the death of her father, and before she became entitled to the estate which it is now sought to charge with the payment of the debt. The arrangement was made by the procurement of the husband. The purchases and the payments were mainly, if not exclusively, Written orders, in the wife's name, for the made by him. delivery of goods, are proved to be in the handwriting of the There is no satisfactory evidence that they were written or sent by her authority, or with her knowledge. There is no direct verbal or written communication from the wife to the complainants, by which she asked credit for the indebtedness, assumed its payment, or made it a charge upon her separate estate.

There is evidence that the wife was sometimes in the complainant's store, that one or more purchases were made by her, and that the articles were uniformly forwarded to her

And the fact that they were so forwarded is shown address. to have been known to her. If, in fact, the business had been carried on in the name of the wife, and the purchases had enured to her benefit, these facts might have been cogent evidence of the agency of the husband, and of his authority to purchase upon the credit of the wife. But where a husband, in the transaction of his own business, assumes to deal in his wife's name, and upon the credit of her estate, her knowledge of the fact will not operate to charge her with participation in the fraud, nor her estate with liability for the indebtedness. So long as she abstains from active cooperation with him, her silence can raise no presumption that he acted as her agent, or by her authority. The wife is under coverture, and so long as she maintains that character, without assuming to act as a feme sole, she cannot be required to interfere in the management of his affairs, or even to expose his wrongful acts. She may remain silent without incurring the imputation of intentional fraud, or charging her estate with liability for his debts.

The acts and declarations of the wife, in order to charge her separate estate, should be clear and unequivocal. No doubt'should exist as to her intention. If the party dealing with the husband, means to rely upon the credit of the wife's estate, good faith and fair dealing require that he should obtain clear evidence of her assent to that arrangement. The evidence in the case is not sufficient to satisfy me that the husband acted by the authority, or as the agent, of the wife in procuring the credit in her name, that such credit was procured by her, or that she charged the indebtedness upon her separate estate.

But if it be admitted that the evidence in the case is sufficient to show that the credit was obtained in the wife's name, by her authority, the question would still remain, whether the separate estate of the wife would be held liable in equity for her general contracts, where the debt was not created for the benefit of the estate, or for her own benefit upon the credit of it. The cases in this state have not gone so far.

Lawrence et al. r. Finch.

The remedy at law, given by the act of March 24 (Pamph, L. 271), for the recovery of debts contribution married women, will probably render the decisio question of little practical importance. Its solution recessary for the determination of this cause.

The testimony of Daniel H. Lawrence, jun., one of nesses on the part of the complainant, resident in of Minnesota, was taken in that state, under a cor issued out of this court. This evidence is objected t ground that the commission was not executed pur the statute.

- It does not appear that the officer before w commissioner was sworn, was duly anthorized to acan oath in the state where the commission was exec appears by the jurat, that the commissioner was swo the "register of deeds, Winona county, Minnesota officer does not certify, nor does it otherwise appea face of the commission, that he was authorized to ister an oath. But the fact does appear by the sta Minnesota, published by authority, which are compe timony in the cause, that registers of deeds are thorized to administer eaths in that state. This is s It is not necessary (although both proper and er that the authority should appear upon the face of th All that the court require is competent evidence o thority of the officer to administer the oath. Den v. son, 1 Harr. 74.
- 2. It is no objection to the admission of the evide the witness is dead. That is one of the contingencic by the express terms of the act, renders the evider petent. The tenth section of the act extends as we examination of a non-resident witness, taken by vir commission, as to depositions taken in this state.
- 3. It is further objected that the evidence is inad because the commissioner did not take the oath pr by the statute. The oath taken by the commissio identical with the form found in *Potts' Precedents*

Lawrence et al. v. Finch.

is a literal copy (with some omissions) of the oath prescribed by Lord Chancellor Macclesfield's order of 9th February, 1721, and which has been since used in the English Court of Chancery, in taking the examination of witnesses within, as well as beyond, the jurisdiction of the court. Beames' Orders in Chancery 327; Hinde's Chan. Prac. 301; 2 Newland's Chan. Prac. 283; 2 Daniell's Chan. Prac. 1080-6.

It was doubtless introduced from the English practice into our own, although the last clause of the oath, relative to keeping secret the testimony of the witness until publication passed, has no applicability whatever to our course of practice.

The oath moreover, in its terms, is materially different from that prescribed by our statute. Nix. Dig. 925, § 2. The oath prescribed by the statute is, that the commissioner will faithfully, fairly, and impartially execute the commission. The oath taken by the commissioner is, that he will, according to the best of his skill and knowledge, truly, faithfully, and without partiality to any or either of the parties in this cause, take the examinations and depositions of all and every witness and witnesses produced and examined by virtue of the commission hereunto annexed, upon the interrogatories now produced and left with me, and that I will not publish, &c.

The word "truly" has been substituted in the oath for "fairly." The words are not synonymous. They have widely different shades of meaning, and convey entirely distinct ideas. Every day's experience teaches us that language may be truly, yet most unfairly repeated. The answer of the witness may be truly written down, yet it may convey a meaning quite different from that which the witness intended to convey, and did convey to the person that heard him speak. On the other hand, language may be fairly reported, yet not in accordance with strict truth. It was held by the Supreme Court in Den v. Thompson, 1 Harr. 72, that the omission of either of the terms used in the preirribed oath, without substituting other equivalent terms, is a substantial departure from the statute.

Lawrence et al. v. Finch.

But there is in the oath taken, a more material departure from the oath prescribed by the statute. The oath taken extends only to the taking of the examinations and depositions of the witnesses produced before him; nothing more. In the English practice, a clerk is employed to write the testimony. and he also is sworn to take and write down the depositions truly, faithfully, and without partiality. There is a clear distinction between taking the depositions and reducing them to writing. In our practice, both duties are usually performed by the commissioner. And the oath prescribed, viz. that the commissioner will faithfully, fairly, and impartially execute the commission, includes the idea that the examination shall be truly reduced to writing, either by himself or by But the faithful, fair, and impartial execution of the commission includes more than merely taking the examinations and reducing them to writing. It requires that the commissioner should use due diligence to procure the attendance of the witnesses; to see that they are in a fit condition, mentally, to testify; to guard them as far as practicable against all improper bias or influence during the examination; to sign the examination of the witnesses, and to enclose it unaltered, under his hand and seal; to annex the examination signed by the witness and by the commissioner, with all the exhibits proved before him, to the commission, closed up under his hand and seal, directed to the judges of the court out of which the commission issued: and when the party asking the commission, or his attorney or agent, is not present to receive it, that he will deposit it in some post office, certifying thereon the time when, and the post office in which, the commission is so placed. All these duties devolve upon the commissioner. Unless they are performed, the commission is not faithfully and fairly executed. oath prescribed by the statute extends to and includes the faithful performance of all these duties. The oath taken is obviously much less comprehensive, and is a material departure from the requirements of the statute.

The authority to take testimony in this manner, is in

Lawrence et al. v. Finch.

derogation of the rules of the common law, and has always been construed strictly. It is necessary to show that all the requirements of the statute have been complied with, or the testimony is not admissible. Hendricks v. Craig, 2 South. 568; Bell v. Morrison, 1 Peters 355; 1 Greenl. Ev., § 323.

The act authorizing the taking the testimony of non-resident witnesses by commission, in terms extends to the Court of Chancery, and its requirements as to the mode of executing the commission, are equally as imperative and binding upon this court, as upon the courts of common law.

Neither the act of 1790, which directed the mode of the examination of witnesses in this court, nor the original act authorizing commissions and the taking of depositions, required the commissioner authorized to take the examination of witnesses resident out of the state, to be sworn. Pamph. Laws (1790,) 628, § 3; Paterson's Laws 374; 1 Hoffman's Ch. Pr. 478, and note 6; 3 Hoffman's Ch. Pr. 137.

The act requiring the commissioner to take an oath, was first passed in 1821. That enactment now constitutes the second section of the act of 1846. Harrison's Comp. 11; Nix. Dig. 925, § 2. It requires that the oath should be taken, as well by the commissioners appointed under the general power and authority of this court, as by those appointed under the provisions of the statute. It was obviously the design of the legislature to subject the taking of testimony by commission, in all the courts having civil jurisdiction, to the same restrictions and regulations. Parties litigant are entitled to all the guaranties which the statute has given them, to secure the fair and faithful execution of the commission, and to guard against all fraud and abuse in the taking and transmission of the testimony.

The evidence taken under the commission must be overruled.

VOL. II.

Administrator of CHARITY AUBLE vs. JACOB D. TRIMMER and others.

The withholding a part of a loan in violation of the agreement of the parties, does not constitute usury. The mortgage stands as a valid security for the amount actually advanced, and no more.

Mr. B. Vansyckel, for complainant.

The answer of Jacob D. Trimmer sets up, that the mortgage of the complainant is usurious, but that charge is abandoned by the defendant's counsel; there is nothing in the case to support it.

The only question between us is, whether there must be an abatement of \$200 from the face of the mortgage.

The mortgage upon which the bill is filed, was given by Jacob D. Trimmer, the defendant, to Charity Auble, April 16th, 1860, for \$1000, payable the first Monday in April, 1861, with interest from date, acknowledged the same day, and recorded April 27th, 1860.

The answer of Jacob D. Trimmer sets up, that he was indebted to Charity Auble in the sum of \$800, upon two promissory notes, and that on or about April 16th, 1860, one William Farley, who was the attorney in fact of said Charity, came to him with a bond and mortgage for \$1000, requesting him to execute it to Charity. That he told Farley, that he owed Charity only \$800; to which Farley replied that she wished to loan him \$200 more, which she expected to receive in a short time from one Daniel Potter, and that he should execute the mortgage for \$1000, and that he, Farley, would give him (Trimmer), his own note for \$200, until the money was collected from Potter. That Trimmer thereupon executed the mortgage for \$1000, and Farley gave him his note for \$200.

Trimmer alleges that the \$200 has never been paid to him, and that he still holds Farley's note.

The case rests almost entirely upon the testimony of William Farley.

Farley says, that in having the mortgage executed, he was not acting as the attorney of Mrs. Auble, but that he was acting both for Mrs. Auble and Mr. Trimmer.

Farley testifies that Mrs. Auble held a mortgage against one Daniel Potter for \$1144, which, with the interest due thereon, amounted in April, 1860, to \$1700. That, by the direction of Mrs. Auble, Potter paid over to Jacob D. Trimmer \$800 (part of the consideration of complainant's mortgage); that Potter gave to Mrs. Auble a new mortgage for \$700; and the remaining \$200 due on the Potter mortgage, Potter was to pay to Jacob D. Trimmer.

Farley further says, that when Trimmer executed the \$1000 mortgage to Mrs. Auble, he (Farley), gave Trimmer his note for \$200 as a memorandum, but that Trimmer agreed to look to Potter for the \$200, and surrender to him his note when he received the \$200.

He further says, that upon the agreement of Trimmer to look to Potter for the \$200, Mrs. Auble, soon after Trimmer executed the \$1000 mortgage to her, surrendered the mortgage to Potter which she held against him, and it was cancelled.

This state of facts is sworn to by William Farley, and there is no evidence to impeach his statement.

If it is true that Mrs. Auble surrendered her mortgage to Potter, upon the agreement of Trimmer to look to Potter for the \$200, she is entitled to recover the full amount of her mortgage against Trimmer.

It does not appear that Mrs. Auble knew that Farley gave Trimmer his note for \$200, or that she authorized, in any way, such note to be given; she merely surrendered her mortgage against Potter, on which there was a balance of \$200 due, upon the agreement of Trimmer to look to Potter for that amount.

Trimmer did not ask to have the Potter mortgage assigned or passed over to him, so that he could hold it against Potter.

It was admitted by Potter, that he owed a balance of \$20, and Trimmer agreed to look to Potter for that amount; whether he ever received that amount from Potter, does not appear.

Mr. Dilts, for defendants.

The only question between the parties in this case is, as stated by complainant's counsel, "whether there must be an abatement of \$200 from the face of the mortgage."

The answer, it is true, sets up usury, but I think there is not evidence to support it.

As to the other point, Jacob D. Trimmer, the defendant received, it is admitted, but \$800 at the time the bond and mortgage were executed. It appears, by the testimony of Mr. Farley, that the bond first drawn was upon its face for \$800, and that at a subsequent time the bond for \$1000 was prepared, as Trimmer desired that amount of money.

It further appears, by Farley's testimony, that he was then acting as attorney for Mrs. Auble, and that he had not the money in hand at the time, to deliver the additional \$200 to Trimmer. It is not shown by Farley, or any one else, that Trimmer ever after received the \$200. In fact, the contrary appears. Trimmer so declares in his answer, and no testimony has been produced to disprove that declaration.

Moreover, Farley says he gave his note to Trimmer at the time the bond was executed, as a memorandum that \$200 was still due to Trimmer on the mortgage. Farley was not bound to pay that note. He had no concern in the matter, except as agent for Mrs. Auble. If a note at all, it was Mrs. Auble's note, and represented, according to Farley's own testimony, a part of the consideration of the plaintiff's bond and mortgage. It has never been paid, but is produced by defendant, recognized and proved by Farley, and made an exhibit in the case. Had the money been paid, of course it would have been taken up; but of this there is no pretence.

With what propriety can the complainant refuse to accept this note as a part payment of the bond, when it was, in fact,

a part of the consideration which passed from her whom he represents, at the time the bond and mortgage were executed? If good in the one case, it is confidently contended it is good in the other. The note considered as Farley's, and not Mrs. Auble's note, was without consideration, and nudum pactum.

But it is pretended that Trimmer was to look to one Daniel Potter, against whom Mrs. Auble held a mortgage for the \$200. That said mortgage was originally for about \$1100, and had been reduced by payments, so that about the \$200, in the opinion of Farley, remained due, and that Trimmer agreed to look to him (Potter), for that balance.

If this was the agreement, why was not the bond and mortgage against Potter given over to Trimmer, instead of Farley's note? If he was to get the money from Potter, it was Mrs. Auble's duty to put in his hands some instrument, showing a rightful claim for the money. How else was he to get it from Potter? A foreolosure, or suit at law, might be necessary. Upon what could Trimmer found such action? He had nothing, and of course could not collect the money of Potter.

But it is said, that upon Trimmer's engagement to look to Potter for the \$200, Mrs. Auble surrendered the bond and mortgage to Potter. What right had she to do so, when those were the only papers upon which Mr. Trimmer could found his claim against Potter for the \$200? What had Trimmer to do with Potter? Their interests do not appear to have been identical. It is not, I think, pretended that Mr. Trimmer ever received more than the \$800 mentioned; but whatever may be pretended, I think it clearly appears he did not.

The note is good for nothing against Farley, and if Trimmer cannot avail himself of it here, he cannot anywhere.

Justice and equity require that he should not be compelled to pay that which he never received.

THE CHANCELLOR. The bill is filed to foreclose a mort-sage given by Jacob D. Trimmer to Charity Auble for

\$1000, bearing date on the 16th of April, 1860. The defendant claims a credit of \$200 on the amount of the mortgage debt, which is disputed by the complainant.

The bond and mortgage were taken through the agency of William Farley, who acted in this behalf as the agent of the mortgagee. It is clearly shown that at the date of the mortgage, there was only \$800 due from the mortgagor to the mortgagee. The balance of the loan was advanced in the shape of a note given by Farley to the mortgagor for \$200bearing even date with the mortgage, and payable one day after date with interest. It is not pretended that this now was accepted by the mortgagor as so much cash, or that he was to look to Farley for its payment. It is admitted that it was a mere memorandum of the amount which remained due from the mortgagee, on account of the loan for which the mortgage was given. The mortgagor, as the consideration of his mortgage, received \$800, the amount of his existing indebtedness, and a memorandum that \$200 remained to be advanced by the mortgagee. That money has never been advanced by the mortgagee, nor received by the mort-The memorandum of indebtedness is still in the gagor. hands of the mortgagor uncancelled.

The withholding a part of the loan, in violation of the agreement of the parties, does not constitute usury. The mortgage stands as a valid security for the amount actually advanced, and no more. Executors of Howell v. Auten, 1 Green's Ch. R. 44.

An attempt is made, on the part of the complainant, to show that the mortgagor agreed to look to one Daniel Potter, for the payment of the \$200 due from Mrs. Auble. The case attempted to be established by the complainant's evidence is, that Potter was indebted (upon bond and mortgage) to Mrs. Auble, the mortgagee, and that Trimmer, the mortgagor, agreed to look for the payment of the \$200 which remained to be advanced to him, not to Mrs. Auble, but to Potter, her debtor. The whole case rests upon the uncorroborated testimony of Farley alone. The transaction, as

detailed by him, is highly improbable, if not absolutely incredible. Mrs. Auble, he alleges, had a bond and mortgage against Potter for his debt, which he, on her behalf, cancelled, and surrendered the bond and mortgage, on a parol agreement of Trimmer to look to Potter for the \$200 due from Mrs. Auble. But Trimmer had no claim against Potter, and no means of compelling him to pay the debt due from Mrs. Auble. The existence of the indebtedness from Potter to Mrs. Auble, is disputed. His administrators dony the existence of any such indebtedness, and the fact that his bond and mortgage were surrendered by Mrs. Auble, and is now in the hands of his administrators, is strong corroboration of the truth of their allegation.

It is in the last degree improbable, that a bond and mortgage for a subsisting debt, would have been surrendered upon a parol promise by a third party to assume such indebtedness. But the conclusive evidence upon this part of the case is, that the note of the witness for the \$200 due to the mortgagor, is still in his hands uncancelled. This evidence cannot be overcome by the uncorroborated testimony of the maker of the note, even if it were much more probable and credible than it now appears.

The mortgage must stand as a security for \$800 only, with interest, and the decree will be made accordingly.

CASES

ADJUDGED IN

THE COURT OF CHANCER

OF THE STATE OF NEW JERSEY.

MAY TERM, 1865.

JAMES DOUGHERTY vs. BENJAMIN SCUDDER.

An injunction will not lie to restrain proceedings at law upon a not in the hands of a bona fide holder, for valuable consideration, on the ground of fraudulent representations made by the payee to the maker.

The complainant, by his bill, alleges that, upon the representations of Thomas M. Brown, of the firm of Brown & Shields, doing business in the city of New York, as to the character and extent of the business done by said firm, he purchased of said Brown his interest therein, for the sum of \$1750. That in payment thereof, he gave to Brown two promissory notes; one for \$500, payable to his order, and endorsed by Shields; the other for \$1250, payable to the order of said Shields, and by him endorsed to said Brown. That subsequently, he learned that Brown's representations were false and fraudulent, that the partnership had been dissolved, that Brown had sold his interest to his partner, Shields, and that the concern was insolvent.

Dougherty v. Scudder.

That Dougherty afterwards obtained an injunction against Brown, in the Superior Court of the state of New York, to prevent his negotiating or disposing of the said notes. That the said injunction, upon certain promises made by Brown to the complainant, was agreed to be dissolved, and was dissolved, upon the faith of such promises.

That Brown, after being relieved from the restraint of said injunction, assigned the said notes to the defendant in this suit; and that, thereupon, the defendant commence a action against the complainant in the Circuit Court of the county of Essex, upon the notes so as aforesaid given by the complainant to the said Brown.

The bill prays for an injunction to restrain the defendant fr m proceeding in his suit. The injunction issued.

The answer alleges that the negotiation for the notes was exirely between Shields and the complainant. That of the terms of that negotiation Brown was ignorant, and was, the crefore, a bona fide holder of said notes, and that the defendant purchased them from Brown, for valuable consideration, and in ignorance of any fraud. The defendant now over the dissolve, upon the answer and proofs.

Mr. Slaight, for defendant, in support of the motion.

Mr. Teese, for complainant, contra.

The Chancellor. The evidence does not sustain the allegation of the bill, that the complainant's notes were given to Thomas M. Brown, to purchase his interest in the firm of Brown & Shields. The firm of Brown & Shields was dissolved on the 23d of October, 1857, ten days before the date of the notes, which are shown to have been dated on the day they were drawn. Upon the dissolution of the partnership, Brown sold his interest to his partner, Shields, for \$2050, to be paid in cash. By a subsequent arrangement, he received from Shields the notes of the complainant for \$1750, in part payment of the purchase money.

Admitting that the complainant was defrauded by Shields,

that the firm was insolvent, and that the consideration of the notes entirely failed, it can constitute no defence against the notes of which Brown was a bona fide holder. As between Brown and Shields, there is no evidence of any fraud on the part of Brown, or that he did not dispose of his interest in the partnership in entire good faith. Nor is there evidence of any fraudulent participation by Brown, in the negotiation between Shields and the complainant.

There is no ground upon which equity can retain the bil1If the complainant has any defence to the notes, it is available at law.

The injunction must be dissolved, and the bill dismisse with costs.

ROBERT C. BACOT vs. FRANCIS G. WETMORE.

- 1. A testator, by his will, ordered and directed as follows, viz. "I do hereb appoint and declare my executors, hereinafter named, to be trustees of al property, estate, or interests, herein given or devised to any of my children or that any of my children may be entitled to by virtue of any provision in this my last will, during the life of such child (excepting the life estated in the mansion-house devised to my son) with full power to retain all such property in their hands unsold and undivided, until after the year eighteen hundred and sixty-seven, and I do authorize my said executors to sell of convey all or any part of my real estate, and all real estate that may be purchased by them, &c. Held, that the power of sale extends to any an every part of the testator's estate, and not to the trust estate only.
- 2. An express disposition, though probably involving an oversight omistake by the testator, cannot be controlled by inference which is nomencessary and indubitable.
- 3. To a common bill for the specific performance of a contract of sale—the parties to the contract are the only proper parties.

Mr. Gilchrist and Mr. A. O. Zabriskie, for complainant.

Mr. I. W. Scudder, for defendant.

Cases cited by complainant's counsel. Snowhill v. Snow-hill, 3 Zab. 447; Hill on Trustees 474-5; Trower v. Knightley.

6 Madd. Ch. R. 91; Wood v. White, 4 Mylne & Craig 480; Holland v. Adams, 3 Gray 188, 191; Holland v. Cruft, I bid. 162; Roberts v. Whiting, 16 Mass. 186, 190; Redfield on Wills, 450; Pratt v. Rice, 7 Cushing 209; Braman v. Stiles, 2 Pick. 460, 464; Wykham v. Wykham, 18 Vesey 395, 423; Coryton v. Helyar, 2 Cox 340; Morrison v. Hoppe, 5 Eng. Law. & Eq. 199; Price v. Sisson, 2 Beas. 168; Cole v. Wade, 16 Vesey 27; Kennell v. Abbott, 4 Vesey 807; Cooke v. Farrand, 7 Taunt. 122; Norcum v. D'Oench, 17 Missouri 98; Wilson v. Bennett, 5 Eng. Law & Eq. 45; S. C., 13 Ibid. 431; Macdonald v. Walker, 11 Ibid. 324; Sohier v. Williams, 1 Curtis C. C. R. 488-90; 2 Roper on Leg. 1461, § 8; Collet v. Lawrence, 1 Vesey 269; Cooke v. De Vandes, 9 Vesey 205; Lett v. Randall, 10 Simons 112; Right v. Compton, 9 East 268; Bowers v. Smith, 10 Paige 193.

THE CHANCELLOR. The bill is filed by the vendor, to enforce the specific performance of a contract for the sale of real estate. The defendant admits that he became the purchaser upon the terms specified in the complainant's bill, but alleges that he failed to perform the contract on his part, and now resists a decree for specific performance, on the ground of defect of title in the vendor.

The complainant claims title to the premises, under and by virtue of a deed from the executors of John Tonnele, deceased. Tonnele died seized of the premises in fee. By his will, he gave and devised to his wife portions of his real and personal estate for her life, in lieu of dower. He devised to his son, John Laurent Tonnele, a life estate in his mansion-house, and part of the grounds belonging thereto, subject to the life estate of the widow. All the rest and residue of his estate he gave to his children, equally to be divided between them, share and share alike, in such manner that each child should receive only the net income of his share during life, and at the death of each child, his or her share should so to his or her lawful issue.

By the seventh item of his will, the testator appoints, orders, and directs, as follows, viz.

"And in order more fully to carry out the objects of this my will, I do hereby appoint and declare my executors hereinafter named, to be trustees of all property, estate or interests, herein given or devised to any of my children or that any of my children may be entitled to by virtue o any provision in this my last will, during the life of sucl child (excepting the life estate in the mansion-house devise to my son,) with full power to retain all such property is their hands unsold and undivided, until after the yea eighteen hundred and sixty-seven, and I do authorize m said executors to sell and convey all or any part of my res estate, and all real estate that may be purchased by them and to invest my personal estate, and the proceeds of the sal of such real estate, at interest, on bond and mortgage of rea estate, or in government or state stocks, or to lay out th same in the improvement of my real estate, or in the pur chase of other real estate and the improvement thereof, a may seem to them most for the interest and advantage (my children, and for the improvement of my estate, and t change such investments as they shall judge best, from tim to time."

It is objected that the executors had no power to conve the mansion-house and premises devised to the testator son, John L. Tonnele, for life.

The terms of the power are as broad and comprehensivas language can make them. "I do hereby authorize m said executors to sell and convey all or any part of my re estate." The power extends to any and every part of the testator's estate. It is clear and unequivocal in its term There is no ambiguity in its meaning. It leaves no roo for construction. If the extent of the power is to be limite it must be by other provisions of the will equally clear, which will remove all doubt as to the testator's real intentio

Where the words are clear, the safest course, in the larguage of Lord Eldon, is to abide by the words; unless upon the whole will, there is something amounting almost demonstration, that the plain meaning of the words is no

the meaning of the testator. Crooke v. De Vandes, 9 Vesey 205.

It is urged that the clause conferring the power of sale stands in immediate connection with a trust created for the management of a portion of the testator's estate; that the whole of that item of the will relates to the trust, and that the power of sale extends only to the trust estate. may have been the design of the testator. And if it were admissible to conjecture what the testator intended to have said, instead of interpreting what he has said, it might be suggested as highly probable that a clause limiting the power of sale to the trust estate has been inadvertently omitted. But it is a well settled rule, that an express disposition, though probably involving an oversight or mistake by the testator, cannot be controlled by inference which is not necessary and indubitable. 2 Williams on Ex'rs 1461. In terms, the power has no relation to the subject matter

of the trust. It is not made dependent for its exercise upon the existence of the trust. It is conferred, not upon the trustees as such, but upon the executors. And although the clause conferring the power is in immediate juxtaposition with the clause creating the trust, there is a marked distinction in the description of the subject matter of the trust, and of the power. The executors are appointed trustees of all the property, estate, or interest, given or devised to any of the testator's children, excepting the life estate in the mansion-house devised to his son. They are authorized to sell all, or any part, of the testator's real estate. The wide difference in the description of the subject of the trust and of the power, is rendered more clear by contrast. acarcely credible that terms so utterly dissimilar should have been used to mean the same thing. The more natural conclusion is, that as the testator's expressions are varied, his intentions in both cases are not the same. Right v. Compton, 9 East 273. There is nothing in the terms of the will, that would justify the court in assuming that the testator de-Signed to limit the power to the trust estate, or to exclude Vol. 11.

the life estate of the testator's son in the mansion-he the operation of the power.

A more serious objection exists to the power of t tors to make sale of the life estate of the widow in sion-house and premises. For not only does the item of the will clearly relate, in all its details, e language of the clause conferring the power, to the the children, but the disposition made of the proce sale is utterly repugnant to, and subversive of, sions made by the testator for the benefit of his w testator had given to his wife, in lieu of dower, an life, or during widowhood, in a large and valuat of his productive estate, including his mansion-he had also bequeathed to her, for life, his horses, plate, household furniture, and all his other movabl But by the clause conferring the power of sale c ecutors, they are authorized to invest his personal of the proceeds of the sale of the real estate so sold,: chase of securities, or in the purchase of other: and the improvements thereof, as may seem most terest of his children and the improvement of l No part of it is, or can be, appropriated for the ber widow. The whole fund is applied to another Now, it is not suggested that the testator intendclause conferring the power of sale, to revoke ti and legacies to his wife, or to deprive her of the made for her benefit. Yet such must be its eff power extended to the lands devised to her. the land was previously devised, constitutes no v tion to the power of sale. All the testator's land devised, either to his wife, or to his children. But tion is that the disposition of the proceeds of sale the benefit of the widow to whom the land is de exclusively for the benefit of the children; thus it clear that the power of sale was designed to ext estate of the children only, not to the estate of and amounting almost to demonstration, that

Dodd v. Flavell et al.

meaning of the words in the power of sale, is not the meaning of the testator.

I am of opinion, therefore, that the deed from the executors to Bacot, conveyed to, and vested in the grantee, a valid estate in fee in the mansion-house and premises, subject only to the life estate of the widow.

But it is charged in the bill, and not denied by the answer, that the widow of the testator had, prior to the date of the contract for sale by the complainant to the defendant, conveyed all her estate in the mansion-house and premises to the complainant. This vested in him a valid title to the entire estate.

The objection made by the defendant to the completion of the purchase, on the ground of defect of title, is not well founded, and the complainant is entitled to a decree for specific performance.

The proper parties are before the court. There is no necessity or propriety in making the devisees of John Tonnele, parties to this suit. To a common bill for the specific performance of a contract of sale, the parties to the contract are the only proper parties. Robertson v. The Great Western R. Co., 10 Simons 314; Wood v. White, 4 Mylne & Craig 460; Fry on Spec. Perf., § 79.

Decree accordingly.

JOHN M. DODD vs. ABRAHAM FLAVELL and others.

- 1. Where the complainant's right is clear, and the infraction of that right established, he will not be required to give security for such damages as the defendant may sustain by reason of the injunction.
- 2. Where the injunction deprives the defendant of the enjoyment of the property in dispute, and must prove greatly prejudicial to his interests, if his claim should be established, the complainant must prosecute the case with diligence. If laches or want of diligence on his part be shown, the injunction will be dissolved, or security required.

Dodd v. Flavell et al.

The complainant filed his bill in this cause, for an injunction to restrain the defendant from unlawfully flooding his land. The injunction issued pursuant to the prayer thereof. The defendant now asks that the complainant may be required to give security for such damages as he may sustain by reason of the injunction.

- Mr. J. W. Taylor, for defendant, A. Flavell, in support of the motion.
- Mr. A. S. Hubbell, for complainant, opposed the application on the following grounds:
- 1. It does not appear by the papers in this cause, nor by the affidavit to be used on this motion, that the complainant has, in any particular, infringed upon the rights of the defendants.
- 2. The bill of complaint alleges injury by the defendant, by unlawfully flowing complainant's land. The flowing is not denied. The right to flow is not established by defendant. The assertion of a right, if made at all by defendant answer, is vague and indefinite. The injunction only prohibits the injury to complainant, and, therefore, he is not responsible to the defendant for the consequences affection his (defendant's) property, by his being restrained from committing an injury to the property of complainant.
- 3. The defendant is restrained from violating his covenativity complainant, by which he agreed and covenanted not of flow the land of complainant. With what propriety cathe defendant ask the complainant to give him security for damages which he may suffer by his performing his owncovenant?
- 4. The affidavit is indefinite and vague; it does not allegthat defendant's mill is unprofitable, because he was restrained from flowing complainant's land, and from doing what he had, or claimed to have, a lawful right to do.

THE CHANCELLOR. The propriety of requiring security from the complainant for such damages as the defendant

Chavez v. Administrator of Peiffer.

might sustain by reason of the injunction in this cause, was considered at the time of allowing the injunction. It did not appear to me then, to be a case in which security should be required.

Upon the case made by the bill, the right of the complainant is clear, and the infraction of that right established. Under such circumstances, the fact that the injunction occasions a serious loss to the defendant, affords no just ground of complaint. He is deprived of the enjoyment of that which rightfully belongs to another.

The case, as made by the bill, is not essentially altered by the answer or proof of the defendant. Inasmuch, however, as the injunction deprives the defendant of the enjoyment of the property, and must necessarily prove greatly prejudicial to his interests if his claim should be established, it is incumbent upon the plaintiff to prosecute the case with diligence.

If he fail to do so, and to bring the cause to hearing at he earliest opportunity, I will entertain a motion to dissolve he injunction. If any laches or want of diligence on the part of the complainant be shown, the injunction will be lissolved, or the complainant required to give the security demanded.

The motion must be denied without costs.

Peter Chavez vs. Jacob Schmidt, administrator of Peter Peiffer, deceased.

An assignment by an executor, of his individual interest in a mortgage and decree belonging to the estate of his testator, such interest being only that of a general creditor of the estate, passes to the assignee no title to the mortgage, nor to the proceeds thereof.

The bill charges that Nicholas Peiffer, the executor of Peter Peiffer, deceased, holding and owning, as such executor, a

Chavez v. Administrator of Peiffer.

bond and mortgage for \$5000, and being a creditor of the estate of his testator, on the 4th of January, 1862, assigned all his individual share, right, title, and interest, in the said bond and mortgage, and in the decree theretofore made for the foreclosure thereof, to the complainant, as collateral security for a debt of \$3000, due from Nicholas Peiffer, in his individual capacity, to the complainant. That on the sale of the mortgaged premises under the decree of foreclosure, there remained in the sheriff's hands, after satisfying a prior excumbrance, a balance of \$2627.29, to be applied toward the satisfaction of the mortgage. This balance was paid be the sheriff to Jacob Schmidt, who had been appointed administrator, with the will annexed, of Peter Peiffer, deceased.

The prayer of the bill is that Schmidt, the administrato may pay over the money thus received from the sheriff, the complainant, who claims title thereto by virtue of the assignment of the mortgage and decree. To this bill the is a general demurrer.

Mr. Keasbey, for defendant, in support of the demurrer-

Mr. T. Runyon, for complainant, contra.

THE CHANCELLOR. There is no equity in the bill. assignment by the executor, of his individual interest in = mortgage and decree belonging to the estate of his testator passed to the assignee no title to the mortgage, nor to the proceeds thereof. The executor had no individual interes in the trust fund in his hands belonging to the estate of his He could not assign the trust funds to pay his individual indebtedness. All the individual interest which the executor, as a creditor of the estate of his testator, could have in the funds of the estate, would be a right to the payment of his debt, or a ratable proportion thereof, out of the assets, upon a settlement of the estate. For all that appears by the bill, the estate is insolvent. Admitting that the

å,

Mittnight v. Smith et al.

estate is solvent, and that a debt was due from the estate to the executor, nothing passed by the assignment but an equitable interest, which the assignee might enforce against the assets in the hands of the administrator, upon the settlement of the estate.

LAWRENCE MITTNIGHT, vs. GEORGE N. SMITH and others.

- 1. A creditor at large, or before judgment, is not entitled to the interference of this court, by injunction, to prevent his debtor from disposing of his property in fraud of the creditor. A bill filed by a creditor of a frm, to restrain an execution creditor of an individual partner from enforcing his lien upon the partnership property, forms no exception to the general rule.
- 2. The doctrine, that a separate debt of one partner shall not be paid out of the partnership property till all the partnership debts are paid is applicable only where the principles of equity are brought to interfere in the distribution of the partnership property among the creditors.

The bill charges that the defendants, George N. Smith and Joseph R. Reutzel, were partners in business under the name of Smith & Reutzel, and were possessed of a large amount of personal property, encumbered by a chattel mortgage. That the complainant is a creditor of the firm, and that an action at law has been commenced, and is now pending for the recovery of the debt. That the chattel mortgage upon the property of the firm has been foreclosed, the property sold, the mortgage satisfied, and a balance of the proceeds of sale, amounting to \$670.98, remains in the hands of the sheriff.

After the suit at law was commenced by the complainant against Smith & Reutzel, and before the sheriff's sale under the foreclosure of the chattel mortgage, George N. Smith confessed a judgment against himself, in favor of inon and Samuel Walters, for \$1500. An execution was issued upon this judgment, and a levy made upon the per-

Mittnight v. Smith et al.

sonal property of the firm of Smith & Reutzel, before the sale under the mortgage. By virtue of this levy, the execution creditors of Smith claim the balance of the proceeds of sale of the property of Smith & Reutzel, in the hands of the sheriff. The complainant, as a creditor of the firm of claims that he is entitled to the proceeds of the sale of the partnership property, in preference to the creditors of ar individual partner.

Upon filing the bill, an injunction issued restraining the sheriff from paying over the money to the execution creditors. The defendants, having answered, now move to dissolve the injunction, on the ground that the equity of the biside is denied by the answer.

Mr. G. W. Cumming, for defendants, in support of themse motion.

. When the equities of the bill are fully answered denied, the injunction will be dissolved. Vliet v. Longuerous mason, 1 Green's Ch. R. 404; Edgar v. Clevenger, 2 Ibiod. 464; Johnson v. Darcy, Saxton 194; Quackenbush v. Vanna Riper, Ibid. 476.

When the defendant, upon whom the gravamen of the charge rests, has fully answered, the injunction will be dissolved, although there are other defendants who have not answered. Vliet v. Lowmason, 1 Green's Ch. R. 404; Goodwyn v. State Bank, 4 Desaus. 289.

If the bill charge fraud in a judgment, and the answer denies the fraud, and shows a fair consideration for the judgment, the injunction will be dissolved. Clapp v. Ely, Stockt. 178; Edgar v. Clevenger, 2 Green's Ch. R. 258.

And this is so, even where the judgment is so irregularly entered that it would be set aside for error. Johnson V-Darcy, Saxton 194; 2 Stockt. 178.

A debtor has a right to prefer creditors, if not done by assignment, or to defraud others. Tillou v. Britton, 4 Halst. R. 136, 138; Hendricks v. Mount, 2 South. 743.

A creditor has a right to acquire a preference by con-

Mittnight v. Smith et al.

fession of judgment. Cammack v. Johnson, 1 Green's Ch. R. 172; Edgar v. Clevenger, Ibid. 261; Garretson v. Brown, 2 Dutcher 425.

A judgment confessed for an existing debt, and for future advances, is a valid judgment. Clapp v. Ely, 2 Stockt. 178.

Mr. Stone, for complainant, contra.

THE CHANCELLOR. The equity of the complainant's bill rests on the well settled principle, that joint creditors have Priority of right to payment out of the joint estate over the Creditors of the individual partners, and that a separate debt one partner shall not be paid out of the partnership Property, till all the partnership debts are paid. The alle-Sations of the bill, that the complainant is a creditor of the firm of Smith & Reutzel, that the partnership property has been seized and taken by virtue of an execution issued upon a judgment at the suit of Walters against Smith, one of the partners, and that there is no other partnership property sufficient to satisfy the demand of the complainant, are facts not denied by the defendants in such mode as to entitle them to a dissolution of the injunction. In fact, no answer has been filed by Reutzel, one of the partners. But, conceding these facts, the execution creditors who are defendants, rely for a dissolution of the injunction, on the allegation of their answer, that, although their judgment is confessed by one of the partners, and is therefore ostensibly the individual debt of such partner, it was nevertheless, in reality, a debt of the partnership, which Smith, who had taken the partnership property, assumed to pay. Admitting that this fact would, if duly established upon the final hearing, constitute a valid defense to the bill, it cannot, I think, avail the defendant upon the present application. It is the averment of a new substantive fact, not a denial of any of the material allegations of the bill. But it is unnecessary to express any decisive opinion upon this point, inasmuch as the injunction must be dissolved upon another ground.

Mattnight r. Smith et al.

The bill itself is radically defective. The complainant has no standing in court, and no right to call in question the validity of the defendant's claim to the partnership property. He has no indement or execution against the firm of Smith & Radical. He is a general creditor only.

A creditor at large, or before judgment, is not entitled the interference of this court, by injunction, to prevent 125 debter trem disposing of his property in fraud of the creetor. In order to enable him to contest the validity of cumbrances of the debtor's property, he must have so specific claim or lien on such property. As to real esta 🛫 🗢 he must have a judgment; as to personal property, must have perfected his lien by execution. Edgar v. Cle 2 conver, 1 Green's Ch. R. 258, and cases cited in note; Me 2 rille v. Brown, 1 Harr. 364; Dunham v. Core, 2 Stock 137. A bill filed by a creditor of a firm, to restrain an exelition creditor of an individual partner from enforcing 🗫 🖼 hen upon the partnership property, forms no exception to the general rule. A partnership creditor, before jud ment, has no such quasi lien on the partnership property, to entitle him to the aid of the court in protecting and e torcing his claim, either against the individual partners, or Young v. Frier, 1 Stock igainst a creditor of a partner. loö.

The doctrine, that a separate debt of one partner shall not be paid out of the partnership property till all the partnership debts are paid, does not apply until the partner sense to have a legal right to dispose of their property as the please. It is applicable only where the principles of equit are brought to interfere in the distribution of the partner ship property among the creditors. McDonald v. Beach, Blackford's R. 55.

The complainant has no such title to, or lien upon, the property in question, as entitles him to call upon the cour to interfere in its distribution. The case falls directly thin the authority of Young v. Frier, and must be controlled by it. That case was decided after full argument and

deliberation; and an extended examination of the adjudicated cases, leaves no room to doubt that it is in accordance both with principle and authority.

The injunction must be dissolved and the bill dismissed.

ZEPHANIAH HUFFMAN vs. JOHN W. HUMMER.

- 1. In a bill by a purchaser of real estate, to enforce the specific performance of a contract for the sale and conveyance thereof, an averment of tender of the purchase money, on the day designated for the execution of the contract, is not necessary.
- 2. As a general rule, in equity, time is not deemed to be of the essence of the contract, unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract. Equity holds time to be prima facie non-essential, and will enforce the specific performance of agreements, after the time for their performance has been suffered to pass by the party asking for the intervention of the court.
 - 3 Equity regards a contract for land, of which a specific execution will be decreed, for most purposes, as if it had been specifically executed. The Purchaser is regarded as the equitable owner of the land, and the vendor of the money.
- 4. Where, upon a bill filed to compel the performance of a contract for the conveyance of real estate, an injunction issued to prevent the defendant from dealing with the property during the pendency of the suit, an objection that time is of the essence of the contract, will not avail the defendant upon a motion to dissolve the injunction.
- 5. Upon a motion to dissolve an injunction, the court will not undertake to determine points of doubt or difficulty upon which the merits of the case may depend, but will leave them to be determined at the final hearing, when the evidence is fully before the court.
- 6. When the answer admits the material allegations upon which the equity of the complainant's bill rests, but sets up new matter in avoidance, the injunction will not be dissolved.
- 7. In many cases, the court will interfere and preserve property in statu quo during the pendency of a suit in which the rights to it are to be decided, and that without expressing, and often without having the means of forming an opinion as to such rights.
- S. It is not necessary to the continuance of an injunction, that it should be clear that the complainant will succeed at the hearing. It is sufficient if there is ground for supposing that relief may be given.

E It is the duty of a complainant holding an injunction, to prosects mis claim with all diligence.

Mr. J. T. Bird and Mr. G. A. Allen, for defendant, in support of the motion.

Mr. Van Fleet and Mr. Wurts, for complainant, corn tra

1 Story's Eq. Jur. Cases cited by defendant's counsel. § 742, 769: King v. Morford, Saxton 281; Stoutenburg Ar. Tompkins, 1 Stockt. 332-5-6; King v. Hamilton, 4 Peters 311; St. John v. Benedict, 6 Johns. Ch. R. 111; Omerodv. Hardman, 5 Vescy 733; Goring v. Nash, 3Atk. 186; Jozoff v. Statham, 1bid. 388; Johnson v. Hubbell, 2 Stockt. 242; Jackson v. Ashton, 11 Peters 229 : 1 Story's Eq. Jur., § 74😂 9: Seymour v. Delancey, 6 Johns. Ch. R. 222; S. C., 3 Co zeen 445; 1 Story's Eq. Jur., § 771; Miller v. Chetwood, 1 Green's Ch. R. 199; Rodman v. Zilley, Saxton 320, 322; Cadma 🕬 Horner, 18 Vescy 11; Creath's adm'r v. Sims, 5 Howard 1 22; Willard's Eq. Jur. 289; Baldwin v. Salter, 8 Paige 4- 73; Boone v. Missouri Iron Co., 17 Howard 340; Doyle v. Teas, 4 Scam. 202; Benedict v. Lynch, 1 Johns. Ch. R. 375; Ea 40n v. Lyon, 3 Vesey 690; Guest v. Homfray, 5 Vesey 818; B rawhiler v. Gratz, 6 Wheat. 528; Taylor v. Longworth, 14 Pc Zers 174; Hephurn v. Auld, 5 Cranch 262, 276; Potter v. Tut 11e, 22 Conn. 512; Colson v. Thompson, 2 Wheat. 336; 1 For 3b.

174; Hephurn v. Auld, 5 Cranch 262, 276; Potter v. Tuz ..., 22 Conn. 512; Colson v. Thompson, 2 Wheat. 336; 1 Formb. Eq., lik. 1, ch. 6, § 3; Pickett v. Loggon, 14 Vesey 215; Herrington v. Wheeler, 4 Vesey 686; Alley v. Deschamps, 13 Vezey 235; Murray v. Palmer, 2 Sch. & Lef. 474; St. Mary's Church v. Stockton, 4 Halst. Ch. R. 520; Howell v. Robb, 3 Halst. Ch. R. 21; Roberts v. Berry, 17 Eng. Law & Eq. 400; 1 Story's Eq. Jur., § 751.

Cases cited by complainant's counsel. 1 Story's Eq. Jury \$784-8-9; Morris Canal v. Jersey City, 1 Beas. 227; Green v. Pallas, Ibid. 267; New Barbadoes Toll Bridge Co. v. Vreeland, 3 Green's Ch. R. 157; Scott v. Ames, 3 Stockt. 261;

etwood v. Brittan, 1 Green's Ch. R. 439; Fry on Spec. rf., § 709-10-11; Batten on Spec. Perf. 135-6; Taylor Longworth, 14 Peters 174; Scarlett v. Hunter, 3 Jones C.) 84.

THE CHANCELLOR. The defendant asks to dissolve the unction issued in this cause, upon the ground that the uity of the bill is fully denied by the answer. It is urged, and other grounds of objection to the continuance of the unction, that time is of the essence of the contract, and at the complainant having failed to make any tender of a purchase money on the day designated for the execun of the contract, or at any other time before the filing the bill, cannot call upon the defendant for the specific formance of the contract, and that the injunction should, prefore, be dissolved. If this be so, the bill itself is radily defective and should be dismissed, for it contains no erment of performance, or of an offer to perform the contract, any excuse for the omission.

The bill is filed by the purchaser to enforce the specific formance of a written contract for the sale and conveyse of real estate. By the agreement, which bears date on 6th of October, 1864, the vendor agreed to convey to the rchaser, for the consideration of \$100 per acre, on or fore the first of April then next, two lots of land in the waship of Lebanon: the one lot being a part of the Stout m, bounded by a designated line, to be run for that purse, supposed to contain about eighteen acres; the other lot and a woodlot, containing about three acres. The purchase ney was to be paid on the execution of the conveyance. ere are other clauses in the contract not material to the seent inquiry.

The complainant, by his bill, alleges, that on the execution the contract he paid \$300 on account of the purchase ney; that he has always been ready and willing to per-Vol. 11.

form the agreement on his part, and upon having a sufficient conveyance of the land made to him in fee simple, clear of encumbrances, to pay the balance of the purchase money; that the defendant refuses to perform the agreement on his part, and pretends that he is unable to make a good title for the land, and that he is willing to cancel the agreement, but not to refund the \$300 advanced by the complainant; and that the defendant refuses to execute a conveyance for the land, although the complainant has requested him to do so, and offered to pay him the residue of the purchase money, upon the execution of a conveyance according to the terms and effect of the agreement. The bill contains no averment of the tender of the purchase money on or before the first day of April, the time designated for the execution of the It is not necessary that it should do so. In this respect the bill is drawn in conformity with approved prece-Curtis' Equity Prec. 9, 12; Equity Draftsman 12. Upon well settled principles of equity, the averment of performance, or of an offer to perform by the complainant according to the terms of the contract, is not necessary.

As a general rule in equity, time is not deemed to be of the essence of the contract, unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract. And one of the most frequent occasions on which courts of equity are asked to decree the specific performance of contracts is, where the terms for the performance and completion of the contract have not, in point of time, been strictly complied with. 1 Story's Eq. Jur., § 776.

At law, time is of the essence of the contract. But, in equity, the question of time is differently regarded. Equity holds time to be, prima facie, non essential, and will enforce the specific performance of agreements, after the time for their performance has been suffered to pass by the party asking for the intervention of the court. Fry on Spec. Perf., § 708, 709.

Equity, moreover, regards a contract for land, of which a

specific execution will be decreed, for most purposes, as if it had been specifically executed. The purchaser is regarded as the equitable owner of the land. The vendor is treated as the owner of the money. And a sale by the vendor to a third party, where a part of the purchase money has been paid, is regarded as a fraud upon the first purchaser. 1 Story's Eq. Jur., § 784, 789.

The objection indirectly made to the equity of the bill is not sustained. Nor can the objection, that time is of the essence of the contract, avail the defendant, at the present stage of the controversy. It may be presented in a different aspect when the evidence is fully before the court. The court will not, at this stage of the cause, undertake to determine points of doubt or difficulty, upon which the merits of the case may depend, nor questions which may be more fully and satisfactorily heard and determined at the final hearing, when the evidence is fully before the court.

When the answer admits the material allegations upon which the equity of the complainant's bill rests, but sets up new matter in avoidance, the injunction will not be dissolved. Allen v. Craberoft, Barn. Ch. R. 373; Salmon v. Clagett, 3 Bland's Ch. R. 162; Minturn v. Seymour, 4 Johns. Ch. R. 499; Morris Canal Co. v. Jersey City, 1 Beas. 228; Green v. Pallas, Ibid. 269; Butler v. The Society, Ibid. 266, 506; The Society v. Low, ante, p. 19.

This rule is so familiar, and rests upon such clear and unquestioned principles of equity regulating the exercise of the extraordinary power of the court, that the citation of authorities would seem to be uncalled for. And yet the principle is so frequently overlooked or disregarded in the discussion of motions to dissolve injunctions, that a reference to authority seems to be demanded.

The answer contains no denial of any of the material allegations of the bill of complaint. It admits the making of the contract, the payment of a part of the purchase money by the complainant, and the refusal of the defendant to execute the conveyance, pursuant to the terms of the agreement.

It bases its denial of the complainant's equity upon two grounds. 1. That the complainant had, by his acts and declarations, waived the performance of the contract by the defendant. 2. Upon the laches of the complainant, in not tendering the purchase money, and demanding the deed upon the first day of April. Admitting that both, or either of these facts, established by evidence, may, upon the final hearing, constitute a valid defense to the complainant's bill, the averments of the answer form no ground for the dissolution of the injunction.

The use of the injunction, in the present case, is merely ancillary to the main design of the bill, to enforce a specific performance of a contract. Its purpose is to prevent the defendant from embarrassing the complainant, or defeating the object of the bill, by dealing with the property during the pendency of a suit. In many cases, the court winterfere and preserve property in statu quo, during the pendency of the suit in which the rights to it are to decided, and that without expressing, and often without having the means of forming any opinion as to such rights Great Western R. Co. v. Birm. & Oxford Junction R. Co. Phillips 602.

It is not necessary, therefore, in order to continue the i junction, that it should be clear that the complainant w junction, that it should be clear that the complainant w junction, that it should be clear that the complainant w junction, that it should be clear that the complainant w junction. It is sufficient if there is ground supposing that relief may be given. Hudson v. Bartra 3 Madd. 448; Atwood v. Barham, 2 Russ. 186.

The only point upon which I have entertained any domes to the propriety of continuing the injunction, is the was of due diligence on the part of the complainant in prosecution his claim. The bill, in this case, was filed on the 21st April. The answer was filed on the 12th of May. No plication has been filed, or other step taken on the part the complainant, to speed the cause. Some excuse for the delay is found in the fact, that the parties have repeated attempted to have a hearing of the motion to dissolve the injunction. It is, nevertheless, the duty of the complains

holding an injunction, to prosecute the case with all diligence. Delay is always injurious, and often oppressive to the defendant. *Brown* v. *Fuller*, 2 *Beas*. 273.

The evidence must be closed, and the cause brought to hearing at the next term, or the complainant must show cause, on the first day of the term, why the injunction should not be dissolved.

ZEPHANIAH HUFFMAN vs. JOHN W. HUMMER.

- A motion to amend a sworn answer in a material matter, must be made apon notice, and be supported by affidavits.
- 2. A sworn answer will not be permitted to be amended in a material particular, by an amendment inserted therein. The amendment must be made by leaving the original in its present shape, and filing a supplemental answer containing the proposed amendment.
- 3. An application to amend an answer is addressed to the discretion of the court. In mere matters of form, clerical mistakes or verbal inaccuracies, great indulgence is shown in allowing amendments, even in sworn a swers. But applications to amend in material facts, or to change essentially the grounds taken in the original answer, are granted with great caution, and only where it is manifest that the purposes of substantial justice require it.
- 4. A written agreement cannot be altered by cotemporaneous parol. In such case, the instrument itself is the repository of the intention of the parties, and the only competent evidence of what their intention was.

This case came before the court on a motion to amend the answer.

Mr. J. T. Bird, for defendant, ex parte, in support of the motion.

THE CHANCELLOR. To a bill by a vendee for the specific performance of a contract for the sale and conveyance of real estate, the vendor answered, admitting the contract and setting up matters in avoidance of the obligation to perform.

The defendant now moves to amend his answer on file, by inserting therein the following averments, viz. that the written agreement does not contain the whole agreement entered into between the parties respecting the sale and conveyance of the land; that it was a part of the contract, though not contained in their written agreement, ("it being deemed unnecessary by them to insert it therein,") that the defendant reserved to himself the crops of grain upon the premises, and the right to enter at all times to gather and remove the same.

There are two fatal objections to the application in its present form.

1. A motion to amend a sworn answer in a material matter, must be made upon notice, and be supported by a fidavits. Vandervere v. Reading, 1 Stockt. 446; Smith Babcock, 3 Sumner 584; Liggon v. Smith, 4 Hen. & Mz 407; 3 Daniell's Ch. Pr. 915; 1 Smith's Ch. Pr. 270.

The necessity of conforming to the practice in this perticular, is sought to be avoided by an averment in the oreset for leave to amend, that the complainant's solicitor admit-ed the same to be true, and that the defendant's solicitor leged that the averment was omitted in the answer by t-----he mistake of the solicitor and counsel of the defendant. complainant's counsel was understood to admit that Lis client did not claim the growing crops, and that the defendedant had been, or would be permitted to gather them without If this be the extent of the admission, it affor — ls objection. no sufficient ground for the order asked for. And whether is, or is not, a correct view of the admission made by couns it is obvious that it would be unsafe, in practice, to base upon the admission of counsel not made expressly in reference to the order sought to be founded upon it, any order materially affecting the rights of his client. The admission should be in writing, or the attention of counsel should be called, and his assent obtained, to the extent and limitations of the admission alleged to have been made.

The mere statement of the defendant's counsel that the

nission of the defendant's answer was by his mistake, cannot pply the defendant's affidavits. The question is not, how happened that the answer was drawn in its present form, ut how it occurred that the defendant swore to a state of ects, as it is now alleged, materially variant from the truth.

2. A sworn answer will not be permitted to be amended a material particular, by an amendment inserted therein. The amendment must be made by leaving the original in its resent shape, and filing a supplemental answer containing me proposed amendment. Dolder v. Bank of England, 10 Yesey 284; Wells v. Wood, Ibid. 401; Edwards v. McLeay, Vesey & B. 256; Bowen v. Cross, 4 Johns. Ch. R. 375; Yandervere v. Reading, 1 Stockt. 449; 2 Daniell's Ch. Pr. 13; 1 Smith's Ch. Pr. 270.

These objections are technical in their character, and as he application may be renewed in a more formal manner, it nay save delay and expense, to express an opinion upon the nerits of the application.

An application to amend an answer, is addressed to the iscretion of the court. In mere matters of form, clerical nistakes, or verbal inaccuracies, great indulgence is shown a allowing amendments even in sworn answers. But applications to amend in material facts, or to change essentially he grounds taken in the original answer are granted, with reat caution, and only where it is manifest that the purposes of substantial justice require it. Wells v. Wood, 10 Vesey 401; Livesey v. Wilson, 1 Vesey & B. 149; Smith v. Babcock, 3 Summer 585; Vandervere v. Reading, 1 Stockt. 446.

In Smith v. Babcock, Mr. Justice Story said: "It seems to be that before any court of equity should allow such amended aswers, it should be perfectly satisfied that the reasons asgned for the application are cogent and satisfactory; that he mistakes to be corrected, or the facts to be added, are ade highly probable, if not certain; that they are material, the merits of the case in controversy; that the party has ot been guilty of gross negligence; and that the mistakes are been ascertained, and the new facts have come to the

knowledge of the party since the original answer was put in and sworn to." And this language is quoted with approbation by the Chancellor in 1 Stockt. 451. Does the defendant bring his application within the operation of the rule as thus stated?

It is clear that the mistake in the case now under consideration, has not been ascertained, and that no new fact has come to the knowledge of the defendant, since the answer was sworn to. Every fact now within the knowledge of the defendant, was known to him at the time of putting in the answer, and it would tend to the encouragement of gross negligence, to permit a defendant to remould an answer, to the truth of which he had sworn, with a full knowledge of all the facts.

But it is suggested that the frame of the answer was "a mistake of the solicitor and counsel of the defendant." It is not pretended that the omission to state the fact now sought to be engrafted on the contract was a mere clerical error. Nor that counsel were ignorant of the fact alleged. If it was a mere mistake of law, it is clear that the answer cannot be amended on that ground.

But is there, in reality, any mistake whatever? The bill is filed to compel the specific performance of a written contract for the sale of land. The answer admits that such written contract was made, and sets up new matter in excuse of performance. The issue tendered is not upon the terms of the contract, but whether the defendant is relieved from the obligation to perform it. If he is, it is quite immaterial what its precise terms were. But the defendant now seeks to raise a new issue touching the terms of the contract, viz. that by virtue of a parol agreement between the parties, the vendor was to have the right to the growing grain. It is not · alleged that the parol agreement formed, or was intended to form, any part of the written contract. On the contrary, it is alleged that it was, by design, omitted from the written contract, the parties deeming it unnecessary to insert it

The written contract which the complainant seeks ein. nforce, is precisely what the parties intended it should be. out it is urged that the written agreement may be altered parol. True, if made subsequently, it may be. mporaneous with the written agreement, the instrument If is the repository of the intention of the parties, and only competent evidence of what their intention was. but why amend? It may cause delay, raise a new issue, pel the complainant to amend his bill, and involve the ties in needless costs. But what practical end can it The defendant is already in possession of the serve? ps. The complainant does not claim them; he only asks execution of the written contract by the delivery of a d for the premises. A deed executed now will not carry title to a crop which has already been gathered and reved from the premises.

The answer appears to me to have been drawn with unial care and precision, to present fairly and distinctly the y issue which the defendant designed to raise, and to it nothing essential to the defendant's case. The amendnt is uncalled for, and in no wise essential to protect the endant's rights.

If, however, the defendant's counsel thinks otherwise, he at liberty to renew his motion, upon proper notice and davits.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW JERSEY,

OCTOBER TERM, 1865.

In the matter of the alleged lunary of Curtist White.

A party prosecuting an inquisition of lunacy, in good faith, will not condemned in the costs of resisting the commission.

This case came before the court, upon a motion to decree the costs of resisting a commission of lunacy against the plicant; the jury having found the alleged lunatic to be sound mind.

Mr. W. H. Vredenburgh, in support of the motion.

The inquisition returned in this case, shows that the just of inquest summoned, charged, and sworn, to inquire whether Curtis White, above named, was a lunatic, found that said Curtis White, at the time of taking said inquisitions was not a lunatic, but was of sound mind. And now, fore a final decree is made by the court in said matter, application is made by the said Curtis White, upon

In the matter of Curtis White.

ice given, (and acknowledged by the solicitor of the apcant, as appears by notice on file,) for an order of this art, decreeing costs against said applicant, (both parties any now alive,) on the following grounds:

- l. Costs are entirely in the discretion of the court, and granted by the Chancellor, as the justice of the case may uire. Blake's Ch. Pr. 199; 2 Madd. Ch. Pr. 415; Jones bxeter, 2 Atk. 400; Bennett College v. Carey, 3 Bro. Ch. 390.
- Costs follow the justice of the demand in equity, as as at law. Roberts v. Kuffin, 2 Atk. 112; Blackburn Fregson, 1 Bro. Ch. R. 425.
- If not allowed costs, said White suffers a loss and inrat the hands, and by the *process*, of the court, without fault on his part. The jury of inquest having found that. White was of sound mind at the time of inquest, it is sumed that he was always of sound mind, and was so, of ree, at the time of application for inquisition.
- A rule not subjecting applicants to costs in such cases, ald tend to encourage litigation, and lead to oppression injustice.

If r. C. A. Bennett, contra, contended that costs should not decreed against the applicant, for the following reasons:

Though the said inquisition did not find the said ris White to be a lunatic at the time of the inquisition, applicant showed by several witnesses that said Curtis nite had not been of sound mind for over two years then it, and up to the time of his making the application, exting a few lucid intervals; that the said Curtis White scalled before the inquisition and examined, and from the elligent manner in which he answered the questions (he ing a man formerly of good and steady business habits, and more than ordinary intelligence,) he was considered by em at that time to be of sound mind, at which time the Plicant charges he was enjoying one of his lucid intervals, deaid applicant charges that he made the application in

of his estate.

In the matter of Curtis White.

good faith, and for the best interests of Curtis White and his family, and by the repeated requests and consent of the wife of said Curtis White, and of all his children of sufficient age to know his situation; said applicant being one of his children.

- 2. The applicant has paid the whole of the costs taxed on his part, and other necessary expenses of the inquisition, which amounted to a large sum, and that the justice of the case does not require the court to make him pay the costs of the defendant.
- 3. The defendant, Curtis White, as shown on the inquisition, is a man of wealth, and is able to pay all costs which, in justice, he ought to pay.
- 4. In equity, the applicant has paid all the costs which, in justice, he ought to pay.
- 5. As to the third reason given by the solicitor of Curtis White, it is denied that he, Curtis White, "if not allowed costs, suffers loss and injury at the hands of the court, without any fault of his," because on the trial of the inquisition it was shown beyond doubt that he had acted in a very strange manner, and neglected his business, and neglected to take proper care of his family. And it is further denied "that because Curtis White was of sound mind at the time of the inquest, that he was always of sound mind, and sale so, of course, at the time of making the application for ∢h∙ quisition." And it is charged that, at the time of making th application, the applicant verily believed, and proved by affidavits of two respectable witnesses, that said Cu It White was not of sound mind, or capable of taking chemical
- 6. This was not a case of oppression, or intended as sand the large amount of costs of the applicant in such cases is sufficient to deter parties from vexatious litigation.
- 7. The finding of the inquisition in the above cause filed on or about February eighth, eighteen hundred sixty-five. The solicitor of Curtis White should have his application for costs at the time of the filing with

In the matter of Curtis White.

court the finding of the inquisition, or within a reasonable time after. If costs are to be allowed him at so late a day, it will tend to prolong and delay the settlement of suits, and will lead to vexatious and annoying questions between solicitors and clients, and opposing counsel, as to costs.

THE CHANCELLOR. The inquisition returned in this case, shows that the jury found that the said Curtis White, at the time of taking said inquisition, was not a lunatic, but was of sound mind. He now asks that the party at whose instance the inquisition issued, should be decreed to pay his costs in resisting the commission.

The commission issued on the application of a son of the alleged lunatic. It is not suggested that it was not made from proper motives, and prosecuted in good faith. The application for costs rests, exclusively, on the ground that the petitioner was unsuccessful in establishing the existence of lunacy at the time of taking the inquisition.

A person petitioning for, and prosecuting a commission of lunacy, is entitled to be repaid the costs he shall have properly so incurred. But if the party be found of sound mind, or the commission be superseded before a guardian is appointed, the prosecutor cannot be allowed his costs, however meritorious his conduct may have been, there being no fund out of which the Chancellor can direct them to be paid. 1 Collinson on Lunatics 461.

The proceeding being instituted for the benefit of the alleged lunatic, or his estate, the petitioner is, in justice, entitled to be repaid his costs reasonably incurred, whether the unacy be established, or not. It is true that where the party s found of sound mind, the prosecutor cannot be allowed his costs, because there is no fund out of which they can be baid. But there is no reason for condemning him in costs, whatever may be the result of the proceeding, provided it was prosecuted in good faith.

So where the petition for a commission of lunacy is opposed, costs are allowed, in the discretion of the court, ac-Vol. II. 2A

cording as the fairness of intention, and the reasonableness of either party's proceedings may appear. The court has gone so far as to order the nearest relations of a lunatic to pay the costs of an opposition to the petition of a mere stranger, where it appeared from their own statements, that a commission ought to issue. In re Smith, 1 Russ. 348; Stock on Non Comp. 97.

Where the commission is sued out maliciously, or without probable cause, the person prosecuting the commission may be ordered to pay costs. Shelford on Lunatics 105. But I find no instance in which costs have been given against a party prosecuting an inquisition in good faith, whatever may have been the result of the inquiry, nor am I aware of any principle upon which such an order could be based.

The motion must be denied.

THE EXECUTORS OF ASA WHITEHEAD, deceased, who was the executor of Abigail Moore, deceased, vs. Thomas J. STRYKER.

Under a declaration of trust: "1. To pay to A. M., or to her order, such dividends as may be declared by said bank during her natural life. 2. At her decease, to pay the same to S. V., or to her order. 3. After the decease of said S. V., then to transfer the said stock to A. M. V., for her sole use and benefit," held, that the interest of A. M. V. vested at the creation of the trust.

Mr. W. S. Whitehead, for the executors.

This bill is filed for a construction of the trust.

Asa Whitehead was sole executor of Abigail Moore, deceased. The complainants are executors of Asa Whitehead deceased. Abigail Moore, by her will, gave the residue of bestate, to certain persons in the will named.

On the 26th of March, 1864, Abigail Moore transferred

homas J. Stryker, the defendant, eleven shares of the capital ock of the Trenton Banking Company, in trust to pay—

- 1. To Abigail Moore, dividends during her natural life.
- 2. To Sarah Vandegrift, dividends at decease of A. M.
- 3. After the decease of Sarah Vandegrift, then to transfer ie said stock to Anna Maria Vandegrift, for her sole use id benefit.

Anna Maria Vandegrift died during the lifetime of Sarah andegrift.

The question in the case is, whether the trust fund vested. Anna Maria Vandegrift, and belongs to her personal reresentatives, or whether it returned to the estate of Abigail loore, and is to be administered by her executor, as portion f her residuary estate.

Parol cotemporaneous evidence is inadmissible to conradict or vary the terms of a valid written instrument. 1 *Ireenl. on Ev.*, § 275.

There is no material difference of principle, in the rules of iterpretation, between wills and contracts. 1 Greenl. on Ev., 287; Jones' Ex'rs v. Jones, 2 Beas. 236.

The rules of law as to vested and lapsed legacies, applicale to this case:

- 1. Where there is no gift but by a direction to pay, or to ivide and pay, at a future time, or on a given event, or to ransfer "from and after" a given event, the vesting will be estponed till after that time has arrived, or event happened. Williams on Ex'rs 1058, and cases there cited.
- 2. "Where the interest only, or income, is given to a person r life, and at the decease of the first taker, or the end of ne period, the capital is bequeathed to another, and where appears from the contract, that no interest in the capital as intended to pass till the determination of the life estate," esting is postponed until the happening of the event. 2 Wilsams on Ex'rs 1066; Billingsley v. Wills, there cited; Giford v. Thorn, 1 Stockt. 702; Patterson v. Ellis, 11 Wend. 259; Andrews v. Bible Society, 4 Sandf. S. C. R. 156.

THE CHANCELLOR. On the 26th of March, 1844, the testatrix transferred to Thomas J. Stryker, the defendant, eleven shares of the capital stock of the Trenton Banking Company. The defendant thereupon executed the following declaration of trust:

"I, Thomas J. Stryker, have had this day assigned to me by Mrs. Abigail Moore, eleven shares of the capital stock of the Trenton Banking Company, to be held in trust, for the purposes following, viz.

First. To pay to the said Abigail Moore, or to her order, such dividends as may be declared by said bank during her natural life. Secondly, and at her decease, to pay the same to Sarah Vandegrift, of Trenton, or to her order. Thirdly, and after the decease of said Sarah Vandegrift, then to transfer the said stock to Anna Marja Vandegrift, for her sole use and benefit." (Signed) "Thomas J. Stryker."

Anna Maria Vandegrift, died in the lifetime of Sarah Vandegrift.

The bill claims, that by reason of the death of Anna Maria Vandegrift in the lifetime of Sarah Vandegrift, the trusts failed in part, and that there was a resulting trust for the estate of the donor.

It appears by the defendant's answer, and by the evidence in the cause, that Sarah Vandegrift, named in the declaration of trust, was a niece of the deceased husband of the donor; that she had received a large sum of money account of a pension due her late husband for his servi ces during the war of the Revolution; and that she was desirous of securing a part of that amount to the family of her I sate husband, and for that purpose assigned the stock, in trust, for the benefit of the said Sarah Vandegrift, and her daughter, Anna Maria; and that it was the intention of the donor that the beneficial interest in said stock, should be vested absolutely in the cestuis que trust, in the manner specified in the decla === tion of trust. The evidence, so far as it relates to the int The intent = < tion of the grantor, is clearly incompetent, must be derived from the language of the instrument itself.

is competent, however, by parol, to show the relation of the cestuis que trust to the donor, and to each other, and the circumstances under which the trust was created.

The real question raised by the answer is, whether by the death of Anna Maria Vandegrift, before her mother, the trust, as to her, lapsed, or whether her interest was vested at the creation of the trust. As applied to the construction of wills, the rule is settled, that where an absolute property in a fund is bequeathed in fractional interests, in succession, at periods which must arrive, the interests of the first and subsequent takers will vest together. 1 Roper on Leg. 584. Thus if a fund is bequeathed in trust for A for life, and then over to her daughter, the entire interest of the fund will be vested in the legatee. The gift to the daughter is postponed to let in the mother's interest, and for her benefit. In such case the future gift is vested. Packham v. Gregory, 4 Hare 398; 1 Roper on Leg. 587.

Irrespective of the parol evidence, looking solely to the terms of the instrument, I think it clear that the interest of the daughter was vested at the creation of the trust. There was an appropriation of the stock for the benefit of the mother and daughter. There was a conveyance of the entire interest of the donor. No condition or qualification is expressed in the gift, or in the creation of the trust. No contingency is expressed upon which the gift should be defeated, nor any contingency alluded to, indicating an intention to reserve any reversionary interest in the grantor, nor is there any disposition of such reversionary estate. simply an absolute gift of the whole subject matter in fractional interests, in succession, at periods which must arrive. The enjoyment of the daughter's interest was postponed, Solviously, for the benefit of the mother during her life. The case falls directly within the rule recognized by the Supreme Court and Court of Appeals of this state, in the case of Howell's Ex'r v. Green's Adm'r, 2 Vroom 570.

The bill should be dismissed without costs.

BENJAMIN MARSHMAN and wife vs. ABEL M. CONKLIN and others.

- I. The trile of evolence, that husbands and wives cannot be with for, or against each other, is independent of the question of interest. A limit hand cannot be a witness for his wife, even in a question touching only had separate estate.
- 2. Where the answer fully lemes the equity of the bill, and is supported by the testimony the injunction will be dissolved.

This cause came on for hearing, upon a motion to discolve the injunction, upon the bill, answer, and proofs. The case was argued before J. Wilson, esq., one of the masters of the court, who was called by the Chancellor to advise with him upon the hearing of the same.

Mr. I. W. Sewider, for defendants, in support of the mot $i \in \mathbb{N}$.

I. No definite trust is set out in the bill, or established key

testimony.

The attempt in the bill, is to charge Abel M. Conklin

The attempt in the bill, is to charge Abel M. Conkers
with a trust, and a violation of the trust.

Marshman and wife, not by deed, but by release, dated 9th Marsh, 1863, released their interest—one undivided harf—to Abel M. Conklin. The release is unconditional.

No trust is set out in the bill. What was the trust?

Marshman's mortgage, bearing date December 1st, 1858. was under proceeding to foreclose. Marshman did not passes. His bond was outstanding. He released his, and his wife in the hist-interest in the bond to Conklin, and Conklin mortgaged to Cooper for \$4000.

Were Marshman and wife to have half-interest in **L** land? That could not be; because they released to Conk** L** their half-interest, with a knowledge that Conklin was mortgage to Cooper.

were Marshman and his wife to have an interest in equity of redemption, after the payment of the \$4000 mo

? If so, what interest? What estate? The bill no where oses.

as Conklin to pay off the \$4000 mortgage to Cooper, and onvey to Mrs. Marshman half of the property? That would browing away \$4000.

7 as Conklin to pay off Marshman's bond and mortgage \$3157.94, with accumulated interest, and then hold the perty for the benefit of Mrs. Marshman? That would bound. There was to have been "a deed or declaration rust, for the interest in said land."

ake all that is said about the trust in the bill to be true, ity could not administer the trust, because it is not nite.

f the court were asked to decree that this trust should carried into effect, what would the court decree?

n the part of the bill setting out the pretences, it is ed, "that the interest so conveyed was at once to be reveyed to your oratrix, Rachel L. Marshman." The previous prest was the ownership of one-half of the lands, subject Marshman's bond and mortgage. If Marshman's bond I mortgage were discharged and Conklin's given in lieu of the case is changed. Was Conklin to re-convey, and Mrs. rshman to covenant to pay half of Conklin's bond and rtgage? If so, such trust is no where set forth. If so,

farshman's testimony leaves the whole matter in doubt. says at one time, she was to have one half of the property, ect to the mortgage to Cooper; at another time, one of the proceeds of the sale. Hill on Trustees 59, 60, 61.

[. To make a trust in lands valid, it must be evidenced come instrument in writing. Nix. Dig. 330, § 11.

ld Mrs. Marshman so covenant?

Il declarations, or creations, of trusts or confidences of lands, tenements, or hereditaments, shall be manifested proved by some writing signed by the party, who is, or I be, by law, enabled to declare such trust, or by his, or last will in writing, or else they shall be utterly void, and

of no effect. Randall v. Morgan, 12 Vesey 74; Hill on Trustees 56; Brown v. Lunt, 37 Maine 434; Servis v. Nelson, 1 McCarter 100.

A grantee cannot set up for his own protection, under an absolute deed, the existence of a parol trust. Statute of Frauls, Nix. Dig. 330, § 11; Hutchinson v. Tindall, 2 Green's Ch. R. 357.

This last case carefully established the doctrine, that there can be no trust, unless it be evidenced in writing, where the deed is absolute. Hill on Trustees 60, 61.

III. There can be no resulting trust in this case.

The complainant, Marshman, swears that the deed which was drafted, Conklin refused to sign; that Conklin said "be would have a paper drawn up himself." Conklin was to "give a satisfactory paper to show our interest in the property."

The testimony of Marshman proceeds on the idea of an express trust. Such express trust was never executed. There can then be no implied trust.

The express trust cannot be shown by parol, because of the statute of frauds. This land was not conveyed by Marshman and wife to Conklin. Conklin owned the undivided half of the property, and the equity of redemption in the other half was owned by Mrs. Marshman. Marshman and wife only released her undivided half, when Marshman was unable to pay the mortgage. 2 Story's Equity Jur., § 1195; Cook v. Fountain, 3 Swanston 585; Leman v. Whitley, Russell 423; Squier v. Harder, 1 Paige 494; Hill on Trustees 106, and following.

This was not a voluntary conveyance by Marshman and wife to Conklin. The property was about to be sold. Marshman's bond and mortgage were outstanding. The sheriff had adjourned the sale. Marshman could not raise the money. Marshman and wife release what they could not retain, and then they have their bond and mortgage both cancelled. Conklin could have waited till the property was sold by the sheriff, and bid in.

The testimony of Abel M. Conklin and John Webber, is conclusive in the denial of the whole equity of the bill.

The testimony of Benjamin Marshman, jun., is not to be relied on. There is testimony as to his derangement. He was not a competent witness.

If sworn at all, he should have been sworn within twenty days after issue joined. Bird v. Davis, 1 McCarter 477.

IV. They are not entitled to an injunction, because they were to have one-half interest in the sale of the property, when Conklin should sell it. This is shown by the answer to question 14: "He would give me a document or paper to show we were half interested in the sale of property, when he should sell."

He should file a bill to account.

Mr. A. O. Zabriskie, for complainants, contra, submitted the case without argument, upon depositions.

THE MASTER. In the year 1855, as stated in the bill, Marshman and wife purchased a tract of land of about fourteen acres, situate in Acquackanonk township, Passaic county, and in the same year conveyed one undivided half to Morris J. Earle. Of the remaining half, Mrs. Marshman subsequently became the sole owner, but at what time, the bill does not state.

In 1858, Marshman and wife mortgaged their half to Conklin, who assigned the mortgage to William Mackey, who subsequently foreclosed; and under the decree of this court, and an execution issued thereon, the sheriff advertised this undivided half for sale, in order to raise and pay the amount due on the mortgage.

In this state of things, an effort was made to raise money to pay the amount due, and an application was made to George Cooper for a loan of \$4000, for that purpose, to be secured by a mortgage upon the whole tract, to be given by Marshman and wife, and Conklin. But Cooper objecting to take his security in that way, and preferring to have a mortgage from a person having title to the whole property, it

was at length agreed that Marshman and wife should release their share and interest in one half to Conklin, and that he should then execute the mortgage to Cooper. The release was accordingly executed to Conklin, who gave the mortgage to Cooper, and received the \$4000, with which he paid off the amount called for by the decree and execution. Conklin afterwards laid out the land in lots, and sold a portion of them at public auction on November 7th, 1863. Some of the purchasers subsequently re-conveyed to him, the lots they had so bought. Afterwards Conklin was about to make another sale, on June 21st, 1865, but just before that day, the complainants filed their bill, and obtained this injunction restraining the sale.

The bill charges that the release and conveyance by Marshman and wife, of her undivided half of the property to Conklin, was made in order to obtain the loan from Cooper, and to enable Conklin to execute a mortgage to him upon the whole property, as Cooper wished to have his security in that way. That Marshman and wife made said release and conveyance to Conklin for that purpose only, and without any consideration received from him, and upon his promise and assurance to them, that he would make and execute to Mrs. Marshman a deed or writing, in the nature of a declaration of trust, so as to make her secure for her interest in the property. That Conklin never did execute such deed or writing, and on being applied to for that purpose, refused to execute it, and now claims to be the absolute owner of the whole tract to his own use, and to be entitled to all the proceeds of the lots already sold, or which may be sold here after.

The prayer of the bill is, that he may be decreed to reconvey to Mrs. Marshman, one half of the property remaining unsold to bona fide purchasers, (subject, however, to such liens as it is just she should bear,) and may be compelled taccount to the complainants for their interest in the proceeds of the auction sales, and that, in the meantime, he may be enjoined from making further sales.

The answer of Conklin denies some of the most material allegations of the bill. It denies that the release and conveyance by Marshman and wife to him, was without consideration. It states that the complainant's undivided half was not worth, and would not have brought, the amount due on the bond and mortgage, to satisfy which it was about to be sold by the sheriff. That the consideration for which the complainants released and conveyed their undivided half to him, was the agreement on his part to take up and cancel that bond and mortgage, and thus relieve Marshman from his liability on the bond, which if not satisfied by the sale, would still stand against him for the balance unpaid. he, Conklin, performed his agreement, assisted in getting the loan from Cooper, and with the money so obtained, paid off the claim, and took up and cancelled the bond and mortgage. And they have been made exhibits in the cause, and are produced to show that he has done so.

The answer further denies, directly and fully, the allegations of the bill, that Conklin promised or assured the complainants, that he would execute a deed or writing to Mrs. Marshman, in the nature of a declaration of trust, for the undivided half so conveyed to him, and says that the conveyance by them to him was unconditional and absolute, and upon the consideration before stated, which, as he insists, he has fully performed. Both parties have taken depositions, which have been read upon this argument, and the statements of the answer in regard to what was the consideration of the release and conveyance to Conklin by Marshman and wife, are supported by the testimony of Hay S. Mackay, who drew the release and conveyance, under instructions from Marshman.

It is not alleged that Conklin gave any promise, in writing, to re-convey, or to execute a deed or declaration of trust to Mrs. Marshman. His parol declarations are relied on to enstain the complainant's case in this respect. And for this Purpose, the deposition of Mr. Marshman, one of the complainants, is offered. The defendants object to it on this

ground, (among others,) that he cannot be a witness in favor of his wife, who is a party in the cause.

It is a well established rule of evidence, that husbands and wives cannot be witnesses for, or against each other. And this is so, independently of the question of interest. It rests on other grounds. And a husband cannot be a witness for his wife, even in a question touching only her separate estate. Davis v. Dinwoody, 4 Term R. 679; Wyndham v. Chetwynd, 1 Burrow 424; Stewart v. Stewart, 7 Johns. Ch. R. 229; Trenton Banking Co. v. Woodruff, 1 Green's Ch. R. 117.

Our statute of March 18th, 1859, (Nix. Dig. 928,) does not alter this rule. Bird v. Davis, 1 McCarter 477. The deposition of Marshman is, therefore, inadmissible.

The equity of the bill is, I think, fully met and denied by the answer, which is supported by the testimony taken, and the defendant is entitled to the full benefit of the denial. I see nothing in the case, which should induce the court to continue the injunction till the hearing.

I do, therefore, respectfully recommend to the Chancellor, to order that the injunction be dissolved with costs.

ISAAC CROSS, one of the executors of George Cross, deceased, vs. Grorge W. Cross and others.

This case was argued before Mr. J. Wilson, called by Chancellor to advise with him. The facts of the case sciently appear in the opinion of the master.

^{1.} The award which is the subject of controversy in this cause, though omitting to decide a matter expressly submitted to arbitration, yet having been accepted by the parties, and acts having been done to give it effect, must stand and be performed in all things which are decided by it.

^{2.} The meaning and effect of the award construed, and the powers of the arbitrators under the reference settled; matters not within the scope of their authority referred to a master.

fr. Ransom, for complainant.

Ir. McDonald and Mr. Ranney, for defendants.

HE MASTER. This bill was filed to obtain a settlement he estate of George Cross, late of the county of Essex, ased. He died in the year 1856, leaving a will and cil thereto, which were proved before the surrogate of county, who granted letters testamentary thereon to c Cross and James Hewson, the executors therein ed, who entered upon the discharge of the duties of their E. Isaac Cross, the complainant, is one of the executors, also a son and devisee of the testator.

he testator devised to his children, Isaac, George W., and caham Cross, and Mary J. Swaim, severally, different tions of his real estate, upon condition, however, that the ises shall not take effect until the devisees, respectively, Il have paid certain sums of money, and delivered up ain notes and mortgages, to his executors, as particularly tioned in the will. Upon the real estate devised to rege W. Cross, there were two mortgages existing at the e of the making of the will, and the executors are directed pay them off, so that George might take the property so ised to him, free and clear of those encumbrances.

The executors are authorized and directed by the will, to be the control of all the real estate so devised to the test's children, and collect the rents, until the conditions on the devises were made, are fully complied with by the ment of the money, and the taking up of the notes and rtgages mentioned in the will.

for a time after the decease of the testator, George W. ss, as agent of the executors, collected the rents of the perty so devised; after which his agency was revoked. d as he had collected a considerable amount of rents, and med that he was entitled to retain out of them the punt of certain notes and accounts, which he alleged were to him from the estate, but which the executors were 70L. II.

٠. ت

not willing to allow to the full amount claimed, they brought a suit against him to recover the rents so collected. An agreement was afterwards entered into between them in relation to the matters so in dispute, and the suit was not brought to trial. By that agreement, George was to be allowed the full amount of those notes and accounts. But the executors afterwards becoming dissatisfied with this, further negotiations were had, and George agreed, by way of compromise, to take one half the amount.

One of the mortgages on the real estate devised to George, and which the executors were to pay off, was given to secure the sum of \$503, and it was afterwards agreed between George and the executors, that he should take it up with part of the moneys which he admitted he owed the estate-He did take it up in pursuance of that arrangement. The other mortgage was given to secure a bond for the sum of \$1000, and in the proceedings in this case, they are known as "the Nelson bond and mortgage." On the 16th of Februar >. 1860, the executors agreed, in writing, with George, that if he would take up this encumbrance, the same should be allowed him, principal and interest, in settlement, on his deli ering to the executors, the said bond and mortgage cancelled. And George did afterwards, on the 20th of the same month, take up said bond and mortgage, and cancelled them, and afterwards delivered them to the arbitrators chosen by the parties, as hereafter mentioned.

The personal property of the testator was considered to be insufficient to pay the debts and claims against the estate, and all parties seem to have acted under the belief that a contribution from the devisees pro rata, according to the value of the estate devised to them respectively, would eventually be necessary for that purpose.

The executors filed an account for settlement in the Orphans Court, which was excepted to, and after having been altered in some particulars, was allowed and passed by the court, at April Term, 1861, showing a balance of \$1231.77, due to the executors from the estate. In this account the

tes and accounts which George claimed to be due to the from the estate, and which had been the subject of conversy between him and the executors, as before mentioned, the stated to have been paid at half their amount. The stated to be due from the estate to a ac, on a certain agreement between him and his father, the testator.

After this account had been so passed and allowed by the parties were still dissatisfied, (the two items just entioned being more particularly objected to,) and further tigation seemed likely to ensue.

It was at length agreed to refer the matters in dispute to Villiam G. Lord, William K. McDonald, and Joseph P. Nichols, arbitrators chosen by the parties, and written aricles of submission were executed for that purpose by all of the said devisees. It was thereby agreed that all matters not already acted upon by the court, should be submitted to the arbitrament and final award of said arbitrators, but that, nevertheless, the arbitrators might, if in their judgment they deemed it right, examine into the said notes and accounts which George claimed to be due to him from the estate, and on which he had, as before stated, been lowed one half, and decide how much was due to him on And also that they might take into consideration agreement under which the Orphans Court had allowed 11 29 to Isaac Cross, as before mentioned, and decide how h was due to him thereon.

It is also expressed and agreed in the articles of submisn, that the arbitrators "shall find what is due the estate by heir, including the pro rata for each, which we promise pay to present date." By the word "heir" here used, evisee" is no doubt meant, and by "pro rata," the prortion, which each devisee ought to contribute to pay the aims against the estate.

It is also expressed in the articles of submission, that orge W. Cross "agrees to deliver to the said arbitrators be Nelson bond and mortgage, given by George Cross, to be

held by them for settlement on his pro rata, per the conditions of the will." And after the arbitrators entered upon the duties of their appointment, he did deliver said bond and mortgage to them, in performance of that part of the agreement.

It is further agreed in the articles of submission, that in order to secure the faithful performance of the award, when made, the said devisees (except Abraham, for whose performance George agreed to go security,) should severally execute to Joseph P. Nichols, one of the arbitrators, leases upon the property so devised to them, respectively, for a term mentioned in the said articles, and that the rents of the same should be collected by an agent, to be appointed by the arbitrators, and be by him paid out "to the parties to whom they might be due, as certified by the arbitrators, according to the award." And this arrangement was to include all creditors of the estate not otherwise provided for. And the manner in which such payments are to be made is particularly specified.

The arbitrators made their award in writing, dated 20th February, 1863. Among other things, it was thereby decided by them that the sum of \$659.60 was due to George W. Cross, being the full amount of the notes and claims theretofore compromised at half that sum, as before stated. Also, that \$1430.37 was due to Isaac Cross, the complainant from the estate of the testator, for house and lot No. New street, Newark, conveyed by him to Mary Cross, mother, and wife of the testator.

The award also states that no evidence had been submitted to the arbitrators "in regard to the amount due farm said devisees, or any of them, to the estate of said George Cross, deceased, other than the will of the said testator."

After deciding various matters submitted to the arbiters by the articles of submission, the award declares the debts and costs therein mentioned as chargeable to the estate, shall be paid by the said parties, as follows, to by Isaac one-fourth, and the remaining three-fourths by

of said devisees pro rata, in proportion to the value of et estate devised to each of them, and such value is and decided by the award.

the award does not decide what is due to the estate the devisee, although that is one of the matters exy submitted to the decision of the arbitrators by the sof submission. They have entirely omitted to make ecision or award upon it. The state of the accounts en the devisees, respectively, and the estate, yet report of the the country, therefore, to be ascertained and settled.

ether this omission would have been a good ground of ion to the whole award, it is not necessary now to infor the parties to the submission accepted the award, roceeded to carry it into effect.

e leases contemplated and provided for in the articles bmission, were executed to Joseph P. Nichols, and he, the advice and consent of the other arbitrators, aped an agent to collect the rents, who has done so ever except the rents of the property devised to George, have been collected by George himself, and retained sown hands, by the permission of the arbitrators. s complained of in the bill as a breach of trust on their

But as they appear to have acted with commendable es, and this point was not insisted on in the argument, not necessary to remark further upon it.

e award having been accepted, and these acts done to t effect, it should stand and be performed in all things are decided by it.

t the meaning and effect of the award are disputed, he court is called on to construe it, and declare its true ing in two particulars, to wit, that part which declares is due to George upon the promissory notes and s before mentioned, and its operation in regard to the m bond and mortgage.

is insisted on the one hand, that though the sum of .60 is declared by the award to be due to George on notes, yet that it has been paid to him, and that it was

not meant by the award to decide that that sum yet remains to be paid. On the other hand, George insists that amount must be paid to him, as a settled and final balance due to him by the estate.

I am of opinion that the award is to be taken as deciding that the true amount which George was entitled to, originally, on those notes and claims, was that sum, and that the award did not mean to decide, and does not decide, whether it has been paid or not. And, therefore, in taking and stating the account between him and the estate, he is, on the one side of the account, to be credited with that amount, as well as with all other sums justly due him from the estate, and that on the other side, he is to be charged with all sums justly due to the estate from him, and in this way the balance between him and the estate, and whether due from him to the estate, or from the estate to him, is to be ascertained and stated.

The other point in dispute, in relation to the effect and meaning of the award, is whether the Nelson bond and mortgage are to be considered as paid by the estate to George, or not. It is insisted, that as the award says nothing about them, and does not decide that there is anything due to George thereon, that therefore he can claim nothing upon them. But they were paid off and taken up by him, under the written promise of the executors, (who by the will were directed, themselves, to pay them with the moneys of the estate,) that on delivering to them the bond and mortgage cancelled, he should be allowed for them on settlement. delivered them to the arbitrators, in order that he might allowed for them on his pro rata. There was no question dispute before the arbitrators, that he was entitled to so allowed. The submission does not say that the arbit ** tors are to decide whether anything, and how much, was to George upon them. It merely says that George shall liver them to the arbitrators, "to be held by them for sett" ment on his pro rata." He did so deliver them, and the are now in the arbitrators' hands for that purpose. A

orge is entitled to credit or allowance for them in the acnt which yet remains to be taken and stated between him ! the estate, in which his *pro rata* contribution to pay the ms against the estate will be ascertained.

t is further claimed on the part of the complainant, that hould be referred to a master to state the accounts been the estate and said devisees, respectively, so as to show pro rata contribution to be made by each devisee, and other anything, and how much, is due from them to the ste, or from the estate to them. On the part of the declant, it is insisted that this should be done by the arbitors, and that the whole matter should be left in their ads, under the authority given to them in the articles of emission.

I am of opinion that the arbitrators have no such power, I that there should be a reference to a master to take and te said accounts, and also an account between the execusand the estate.

The articles of submission have a two-fold character. ifirst place, certain matters therein mentioned, are thereby bmitted to the judgment and arbitrament of the arbitra-3, who are to make their award thereon. And in the ond place, it is agreed, that in order to secure the permance of the award, the persons named as arbitrators ruld have the power under the leases, before mentioned, to lect and dispose of the rents as therein specified. first part of these articles, the persons appointed as arators, acted in that capacity, and made their award, and ir powers as arbitrators were thereby performed, and e at an end. Under the second part, they are to act, not wbitrators, but in the character of trustees, in collecting paying out the rents; and the articles by which they appointed, and from which they derive all their powers, not give them the power to settle the accounts in the aner before mentioned. That must now be done under direction of this court, and for that purpose a reference

to a master is necessary. And the master, in taking the accounts, should be guided by the views herein expressed.

The account allowed in the Orphans Court was not a final account, nor was it meant to be so. It must stand and be observed, in regard to all matters decided by it, except as to the two items which, by agreement of parties, were submitted to the arbitrators, and on which they have decided in their award, to wit, the amount due to George on the disputed notes and accounts, and the sum due to Isaac from the estate, for the house and lot conveyed by him to his mother-

All proper items of debt or credit, for or against any of the said devisees or the estate, whether before or since the passing of that account, may be considered by the master, and rejected or allowed, according to his judgment, under the evidence which may be produced before him. It is alleged that while George acted as agent for the executors in collecting rents, before the articles of submission were entered into, he collected, or was chargeable with, the rent accruing from the property devised to him, and that he has never accounted for, or paid them to the executors. If the master finds this to be so, he should charge George accordingly.

He should also be charged with all rents of the property devised to him, accruing since he leased the same to Nichols, but should, on the other hand, be allowed for all taxes, insurance, repairs, or other proper expenses paid by him. And hereafter George should not collect or receive any rents of that property. They should be paid to the said trustees, or to their agent, the same as the rents of the property of the other devisees, and as provided for in the articles of submission. And an order should be made, if necessary, that George should in no wise hinder or interfere with them in collecting the same.

I respectfully recommend to the Chancellor to make an order of reference to a master to take said accounts, as before mentioned, and to carry out the views herein expressed.

James B. Staats and Aletta Ann, his wife, vs. Zaccheus Bergen and James L. Bergen.

- 1. A judgment rendered against a plaintiff in a strict legal proceeding, is no bar to a suit in equity upon the same subject matter, where the complainant presents equitable grounds of relief, which were not, and could not be, considered or decided by the former tribunal.
- 2. A husband is not a competent witness in a cause in which his wife is aparty.
- 3. It is the recognized law of this state, that a trustee, in the exercise of his duty as trustee, cannot become the purchaser of the property of his cestuz que trust. The rule applies, as well where the sale is made by a sheriff or master, as by the trustee himself; and in the latter case, whether the sale was made by the trustee, of his own authority, or under a judicial order or decree.
- 4. A trustee is not relieved from his incapacity to become a purchaser at the sale of the real estate of his cestui que trust, by the fact that the legal estate therein is not in him.

This cause was argued before J. Wilson, esq., one of the masters of the court, who was called by the Chancellor to sit and advise with him. The facts of the case are fully stated in the opinion of the master.

Mr. Ransom, for complainant.

- 1

The same of the sa

Mr. Dilts, for Z. Bergen, one of the defendants.

Cases cited by complainants' counsel. Page v. Page, 8

w Hamp. R. 187; Hill on Trustees 92, and cases in the

n tes; Ibid. 94, 96; Peebles v. Reading, 8 Serg. & R. 484;

Linnels v. Jackson, 1 How. (Miss.) 358; Orr v. Pickett, 3

J. Marshall 269; Perry v. Head, 1 A. K. Marshall 46;

Ladwick v. Felt, 35 Penn. State R. 305; Gilmore v. John
n, 29 Georgia 67; Belcher v. Saunders, 34 Ala. 9; Fer
son v. Williamson, 20 Arkansas 272; Wilkinson v. Williamson, 1 Head 305; Bryant v. Hendricks, 5 Clarke (Iowa)

256; Hall v. Young, 37 New Hamp. R. 137; Northeraft v.

Martin, 28 Missouri R. 469; Walraven v. Lock, 2 Patton & Heath 547; Soggins v. Heard, 31 Miss. 426; Bruce v. Roncy, 18 Illinois 137; Ncill v. Keese, 13 Texas 137; Hill on Trustees 368, and note; Cumberland Coal & Iron Co. v. Sherman, 30 Barb. 553, 567; Michoud v. Girod, 4 Howard 503, 555-9.

THE MASTER. In the year 1840, Abraham I. Staate, father of the complainant, James B. Staats, died intestate, leaving, surviving him, his widow, Mary Staats, and three sons, to wit, the said James B. Staats, and John A., and Evert B. Staats. By agreement between said widow and heirs-at-law, they placed one thousand dollars in the hands of her brother, Zaccheus Bergen, the defendant, as trustee, the interest of which was to be paid to her during her life: in lieu of dower, and after her decease, the principal was be paid equally to her said three sons. Mr. Bergen ther upon executed a declaration of trust in writing, under seal dated 3d May, 1845, which is as follows, to wit: "Wherea = I, Zaccheus Bergen, of the county of Somerset, and state New Jersey, have this day received of George H. Brow attorney of Mary Staats, widow, and John A. Staats, James B. Staats, and Evert B. Staats, heirs-at-law of Abraham Staats, deceased, of the same place, the sum of one thousardollars, of which the said widow is to receive the intere= during her life, in lieu of her dower in the real estate of he late husband, by agreement between her and the said heir -Now, therefore, know all men by these present that I, the said Zaccheus Bergen, have received the said su= of money, as trustee of the said widow and heirs-at-law, arm I do hereby agree to place and keep the same at interes upon good security, during the natural life of the said widoand to pay her the interest arising from the said sum, a nually, so long as she may live. And I do further agree and with the said heirs-at-law, to pay over, within one ye after the death of the said widow, the said sum of one thosand dollars, with the interest that may have accrued there-

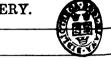
after her death, to the said John A. Staats, James B. Staats, and Evert B. Staats, their heirs or assigns."

Annexed to said instrument is a written confirmation thereof, of the same date, signed by the said heirs, which is as follows: "The above trust is pursuant to agreement between us and the said Mary Staats, widow, as above said, and we do ratify and confirm the same."

Afterwards, and about May 1st, 1846, Mr. Bergen, the trustee, lent to said James B. Staats the sum of \$333.33, one-third of said trust money, being the portion thereof which, on the decease of said widow, would be due to him. To secure this loan, the said James B. Staats executed to Mr. Bergen a mortgage upon his farm of about ninety-two acres, in Somerset county, and upon which there was then existing a prior mortgage for \$1100, given to P. P. Quick, to secure tain trust moneys, which he held for said Alletta Ann Staats, and which he had lent to said James B. Staats, her hasband.

In a foreclosure suit, afterwards brought in this court by Mr. Van Nest, upon a mortgage subsequently given on id farm, and in which suit Mr. Bergen and others holding ortgages thereon, were defendants, a decree for the foreclosure and sale of the mortgaged premises was made, and other an execution issued thereon, the sheriff, in March, 1859, sold the farm to John A. Staats for \$3910, and conceyed it to him. This sum so raised by the sale, was more than enough to pay the amount due to Mr. Bergen, on the said mortgage held by him as trustee, after paying the prior mortgage, and the costs and expenses of sale.

The purchaser, John A. Staats, executed four mortgages on the farm as follows, to wit: one to Wm. S. Cook, for \$1200; one to said Z. Bergen, for \$333.33; one to P. P. Quick, for \$1000; and one to J. M. Mann, for \$800. The first three were dated 4th April, 1859; the other was dated one day later. And these four mortgages were so recorded, that in regard to their priority as liens, they stood in the order in which they are here mentioned. The mortgages to



Quick and Mann were given to secure moneys, which they respectively held in trust for said Aletta Ann Staats. The mortgage so given by John A. Staats to Zaccheus Bergen, does not, on its face, show that it was given to him, as trustee, to secure one-third of the trust moneys so placed in his hands. But, in his answer, Mr. Bergen admits that it was. He appears simply to have continued the investment of that portion of the trust moneys, by taking a new mortgage for it upon the same farm, from the purchaser at the sheriff's sale.

On the 31st of October, 1861, Mr. Bergen, still holding said last mentioned mortgage, executed in writing, under his hand and seal, a second declaration of trust, which is as follows, to wit: "This writing witnesseth that I, Zaccheus Bergen, of the township of Hillsborough, and county of Somerset, hold a bond and mortgage given by John A. Staats and his wife on a farm in Bridgewater township, in said county, to secure the sum of \$333.33, with interest thereon, as trustee, to be appropriated by me to the support of Mary Staats, as far as it may be necessary, during her natural life, and to the payment of her funeral expenses; and within one year after her decease, I promise, and bind myself, my heirs, executors, and administrators, to pay the residue that may remain in my hands, to James B. Staats, of Newark, in the county of Essex, his heirs or assigns."

The James B. Staats here mentioned, is the same who was mentioned in the first declaration of trust. On the ninth of February, 1861, by writing, under his hand and seal, he assigned all his interest in said bond and mortgage and the moneys secured thereby, to his son Abraham I. Staats, which in his testimony in this case, states that it was so assigned to him in trust for his mother, the said Aletta Ann Staat though it is not so expressed in the instrument itself.

10th September, 1863, and before the commencement of the suit, he assigned directly to her all his interest in said board and mortgage and the moneys thereby secured.

On the thirty-first of May, 1860, J. M. Mann filed in to court, a bill to foreclose the mortgage for \$800, upon sa

a, executed to him as trustee of Mrs. Staats, as before tioned, making Zaccheus Bergen and the other persons ling mortgages thereon, defendants in said suit. A decree made for the sale of said farm, to raise and pay the teys due on said four mortgages given by John A. Staats, he following order, and to the following amounts, to wit, Wm. S. Cook, \$1363.06; 2d, Zaccheus Bergen, \$372.82; P. P. Quick, \$1203.34; 4th, J. M. Mann, trustee &c., 9.39; with interest on said sums from 28th March, 1861. Her execution issued on this decree, the said farm was exed to sale by the sheriff, on the twenty-seventh of May, 1, and was struck off to said Zaccheus Bergen for \$1850, being the highest bidder therefor, and the sheriff executed aim a deed for the property.

After the sale, Aletta Ann Staats requested Mr. Bergen convey the farm to her, because, as she alleged, he had 'eed to buy it for her at the sheriff's sale, and also be-18e at such sale he was acting as trustee, and she was ened to the moneys secured by the mortgage so held by him trust, and to satisfy which, with other encumbrances, the u was so sold; she offering, if Mr. Bergen would convey o her, to re-pay him what he had paid for it, and someig in addition for his trouble. Mr. Bergen at first seemed posed to accede to her request, but finally refused, and med to hold the farm as his own. Afterwards he coned an undivided half of the farm to his son James L. gen, one of the defendants in this case. The bill charges James took that conveyance with full knowledge of all facts of the case, and of the equitable right and claim of . Staats to have the farm conveyed to her. ed to answer the bill, and it has, by order of the court, 1 taken as confessed against him.

he prayer of the bill is, that the defendants may be ded to convey the farm to said Aletta Ann Staats, upon paying to Zaccheus Bergen the amount he had paid for it, lse that he may be compelled to pay her the said \$333.33, a interest.

The answer of Zaccheus Bergen admits the execution of the above mentioned declarations of trust, the execution of said mortgages to him for part of the trust moneys, and his purchase of the farm at said sheriff's sale for \$1850, and insists that he had a right to buy it for his own use. It also states that an action of debt was brought in the Supreme Court of this state by Abraham I. Staats, against said Zaccheus Bergen, by process, returnable 24th March, 1862, upon said second declaration of trust, (which was before Abraham had assigned the same to his mother,) and that in said sui t, upon a demurrer filed by the plaintiff to one of the pleas of the defendant, judgment was given for the defendant at the Term of November, 1862, and that said judgment still stands in full force, and the plaintiff therein has paid the defendant's taxed costs, and abandoned the suit. And that, therefore, he cannot be further called upon in this suit, to answer upon said matters. A copy of the record in that suit in the Supreme Court, is in evidence here.

The answer also denies that Mr. Bergen agreed to buy the farm for Mrs. Staats at the sheriff's sale, as charged in the bill. It also insists that under and by virtue of the said second declaration of trust, Mr. Bergen was trustee only for the widow, Mary Staats, of the bond and mortgage there.n mentioned, and that his trust ended at her decease, and that he was not, under the same, trustee for said James B. Staats, or his assigns, but was only bound to pay over such residue of the moneys secured by said bond and mortgage as he might receive thereon, as might remain in his hands unexpended for the support of said widow, or for her funeral expenses, and that no such residue of said moneys remain in his hands to be paid over, and that he has in all things performed his duties under said instrument.

The judgment in the suit in the Supreme Court, mentioned in the answer, is not, in my opinion, a bar to the present proceeding. That was an action of debt, brought upon the second declaration of trust, which was declared on as a bond. That suit was a strict legal proceeding, and the

unds of relief now presented to this court, on the omplainants, were not brought into view, and could not, in that suit, be considered or decided court. They are now before this court, and sidered and decided here.

Staats, one of the complainants, was examined in this case, on the part of the complainants, etcd to as an incompetent witness at the time, s examination was commenced. This objection en, and his testimony cannot be received. He betent witness in a cause in which his wife is a point was settled in this court, in Bird v. Davis, 167.

tion in the bill, that Mr. Bergen agreed to buy he sheriff's sale for Mrs. Staats, is denied by and is not sustained by the evidence.

ation of trust, executed by Mr. Bergen on the , 1845, shows clearly that the \$1000 then placed was held by him as trustee for the widow, Mary ier three sons, of whom the complainant, James one, and that Mr. Bergen was to keep the same pon good security during her life, and pay the er, and after her decease, was to pay the princiaid sons, their heirs or assigns. One-third of il sum he lent to said James B. Staats, and the ecuted by him to Mr. Bergen as security thereby him as such trustee.

farm was sold, under the foreclosure of Van ch, 1859, at the sheriff's sale first above menrought enough to pay the amount due on the held by Mr. Bergen, after satisfying all prior the costs and expenses of sale. Mr. Bergen then was entitled to receive, as trustee, that amount, is duty as such trustee, to invest the principal 3.33 for the benefit of the cestuis que trust, to ow and her said three sons. He did so invest 3 a mortgage for that amount on the same farm,

from John A. Staats, who bought it at that sale. That mortgage, as already stated, was dated the fourth of April, 1859.

It was Mr. Bergen's duty, as trustee under the declaration of trust just mentioned, to take care of that investment and collect the moneys secured thereby, and apply them in pursuance of the trust. That mortgage always afterwards remained in his hands. On the 31st of October, 1860, he executed the second declaration of trust. I consider that under this instrument, Mr. Bergen became trustee of said mortgage and of the moneys thereby secured for the purposes therein mentioned, and that, as such trustee, it was his duty to guard and take care of that investment, and apply those moneys to the purposes of the trust, that is, for the support of the widow during her life, and, if necessary, for her funeral expenses after decease, and then, within one year, to pay the residue to said James B. Staats, his heirs or assigns.

The widow, Mary Staats, died on February 14th, 1861. I do not think that the position taken by the defendant's counsel, that the trust of Mr. Bergen, under this second declaration, ended at the decease of the widow, is correct. I am of opinion that the trust, and the obligations which as trustee he had assumed, still continued, and that as such trustee, he had duties still to perform towards James B. Staats, or his assigns, to whom as cestui que trust, the residue of said moneys, not expended for the widow, was du after her decease. The right of James B. Staats passed assignment, first to Abraham I. Staats, in trust for Alet Ann Staats, and then directly to said Aletta Ann Stazi The duties of Mr. Bergen, as trustee, were herself. thereby in any wise altered or affected, except as to person towards whom they were to be performed.

I do not understand Mr. Bergen as claiming that anythis is to be deducted from the principal sum secured by the mortgage, on account of any money paid for the support the widow, or for her funeral expenses. He says, in his

timony, that he spent about \$200 "at the time of the funeral, and it has been paid in such a way, that no part of it is chargeable to the claim of the complainant." He claims, however, that the mortgaged premises did not sell for enough to pay that mortgage, after satisfying prior encumbrances, and that no part of the moneys secured by it, came to or remained in his hands after the widow's death, and that he is, therefore, not responsible for the said moneys, or any part thereof.

When the mortgaged premises were sold by the sheriff, on the twenty-seventh of May, 1861, Mr. Bergen was still trustee as aforesaid, under the second declaration of trust, and as such, held the said mortgage to secure the said \$333.33, trust moneys. He was, as the holder of that mortgage, one of the defendants in that suit, and the sale was to raise money to pay that mortgage, as well as other encumbrances. He bid for the tarm at that sale, and became the purchaser, and now claims to be entitled to hold it as his own. Is he entitled to do so?

The farm did not sell for enough to satisfy the first two mortgages. Mr. Bergen says, in his testimony, that the residue of the sum which he bid for the property, remaining after satisfying Cook's mortgage, which was the first encumbrance, was \$294, or \$297; and that he paid it over to Quick, whose mortgage he believed to be the second lien. dence shows that Mr. Bergen was mistaken in this. mortgage held by Mr. Bergen, as trustee, was the second lien. It is so stated in the decree and execution under which the sale took place, and Mr. Bergen, as before stated, was a party to that suit, as well as purchaser at the sale. residue should have been applied to that mortgage held by him, and not to Quick's mortgage. But if so applied, it would not have satisfied it, and the mortgages held by Quick and Mann, both of which were given to secure moneys held by them in trust for Mrs. Strats, would have remained wholly unpaid. So that, in either case, whether that residue

were applied to the mortgage held by Mr. Bergen, or to that held by Quick, Mrs. Staats would be a loser to a large

The complainants insist, that at the time of the sheriff's sale to Mr. Bergen, the farm was worth \$4000 and upwards. and would have brought that sum at a fair and open sale, and that persons who might otherwise have bid, may reasonably be supposed to have been prevented from doing so by seein g that Mr. Bergen was bidding, whom they knew to be trustee, and might suppose to be acting for the benefit of his centre?

que trust. This is denied by the defendant, who says that the farm was not worth more than \$100 to \$150 above what

he bid for it, and that the sale was a fair and open one.

I do not think it necessary to examine and weigh the evidence in regard to the value of the farm. The case must, think, be decided on other grounds. The doctrines and primciples which apply to, and regulate the respective rights and duties of trustee and cestui que trust, must, in my opinion, govern this case.

The farm which Mr. Bergen bought at the sheriff's sale, was property upon which he, at the time, held a mortgage, which he had taken as security for moneys held as trustee.

The sale was by virtue of a decree and execution in a foreclosure suit, brought by the holder of another mortgage on the same farm, in which suit Mr. Bergen was a defendant. and the sale was to raise and pay the moneys due on the mortgages upon the property, one of which was the said

mortgage held by Mr. Bergen, as trustee. In 4 Kent's Com. (3d ed.) 438, it is said, that "it is a general rule, applicable to sales, that when a trustee, or any person acting as agent for others, sells a trust estate, and becornes himself interested, either directly or indirectly, in the Purhis

16.

he

election, to acquiesce in the sale, or to have the property exposed to sale, under the direction of the court, and to dif put up at the price bid by the trustee; and it makes no

chase, the cestui que trust is entitled, as of course, in

ference, in the application of the rule, that the sale was

nction, bona fide, or for a fair price. The rule is on the danger of imposition, and the presumption of tence of fraud, inaccessible to the eye of the court. cy is to shut the door against temptation, and which, ases in which such relationship exists, is deemed to elf sufficient to create the disqualification."

ame doctrine is laid down in 3 Sug. on Ven. & Pur. Story's Eq. Jur., § 322; Michoud v. Girod, 4 How. R. 503; Davoue v. Fanning, 2 Johns. Ch. R. 252; 1 last case, Chancellor Kent reviews, at length, the decisions, and approves and sustains them.

the rule, as there recognized by Kent, has been in its broadest extent in this state, in Scott v. Gamble, . 218, 237. The rule is also held to be applicable, the sale was made by a trustee, of her own authority, r a judicial order or decree. See above cases, and way et al. v. Green's adm'r, 1 Harris & Johns. 151. t may be said that where a sale (as in the present as not made by the trustee himself, but by a sheriff, er, or other officer, under a judgment, decree, or exethe rule does not apply, and that the trustee may, in se, purchase and hold the property for his own beneit it is held that the rule applies to such sales, as to those made by the trustee himself, as will be seen ollowing cases. The York Building Co. v. Mackenzie, 1 Davoue v. Fanning, 2 Johns. Ch. R. 252; Bell & Mong, 2 Gill 163; Callis v. Ridout, 7 Gill & 1; Spindler v. Atkinson, 3 Maryland R. 409; Barv v. Leech, 7 Watts 472; Conger v. Ring, 11 Barb. . R. 356.

itrary doctrine was held in the case of Fisk v. Sar-Vatts & Serg. 18, by a majority of the court, but Jusgers dissented from the decision, and in his opinion, marked by much learning and force of reasoning, he shows that the true rule is as laid down in the st cited.

y be further urged that the legal estate in the farm

sold, was not in Mr. Bergen, and that, therefore, his situation in regard to the property, was not such as to prevent his becoming a purchaser. But the cases last cited show that the rule is applicable, in all its force and strictness, in such cases also. And the reason and policy of the rule, as above stated, upon the authority of the cases cited, show that it ought so to apply.

It was for the interest of the cestui que trust that the farm should, if possible, sell for as much as would, after paying prior liens, satisfy, not only the mortgage held by Mr. Bergen as trustee, but also the mortgages held by Quick and Mann, which were given to secure moneys held in trust for But if Mr. Bergen could come forward as a bidder at the sale, and buy the farm for himself, it would be for his interest that it should sell for as low a price as possible. so his interest as an individual would come in conflict with the interest of his cestui que trust. It is not necessary 🕶 show that he acted unfairly in the purchase, or that the farm did not bring its full value; it is enough, according the foregoing authorities, that he was in a position which e **posed him to temptation, and which might induce him act for his own benefit, and against the interests of t ccstui que trust.

In the case of Van Epps v. Van Epps, 9 Paige's R. 23 the defendant held a second mortgage upon certain land, trust for the complainant. The holder of the first morgage foreclosed, and at the sheriff's sale the defendant boug the land and claimed to hold it for his own benefit. But the court decided that he could not do so, and that he could on hold it as trustee for the benefit of the cestui que trust.

Chancellor Walworth, in his opinion in that case, say "The rule of equity which prohibits purchases by partiplaced in a situation of trust or confidence, with reference the subject of purchase, is not, as the defendant suppose confined to trustees or others who hold the legal title to the property to be sold; nor is it confined to a particular classification, such as guardians, trustees, or solicitors. But

Firmstone v. De Camp.

is a rule which applies universally to all who come within its principle, which principle is, that no party can be permitted to purchase an interest in property, and hold it for his own benefit, where he has a duty to perform in relation to such property, which is inconsistent with the character of a purchaser on his own account."

That case, in its principal features, bears a strong resemblance to the present one, and the doctrines there laid down, and the reasoning on which they are founded, are, I think, sound and just, and applicable to the case now under consideration.

I am of opinion that Mrs. Staats, the complainant, is entitled to relief, and that upon her paying to Zaccheus Bergen, the amount he gave for the farm, and such further sums as he has expended in discharge of liens upon the same, or for repairs, or proper and permanent improvements, the defendants should be decreed to convey the farm to her, and that there should be a reference to a master to ascertain the amount so paid, unless the parties can agree upon it between themselves.

I respectfully recommend to the Chancellor to make an order and decree accordingly.

WILLIAM FIRMSTONE vs. EDWARD DE CAMP.

- 1. Equity will protect a party against a plain mistake in a written agreement.
- 2. An injunction will not be dissolved as of course, even though the equity of the bill is denied by the answer. The court may, in its discretion, retain the injunction until the hearing, if the circumstances of the case, and justice between the parties, require it.

This cause was argued before J. Wilson, esq., one of the masters of the court, upon a motion to dissolve the injunction, which issued pursuant to the prayer of the bill.

Mr. Vanatta, for defendant, in support of the motion, cited 1 Bouvier's Dic. "Accident;" 1 Story's Eq. Jur., §149, 152; Ibid., § 78, 93, 99 b, 101, 105, 109; Parsons v. Heton, 3 Stockt. 155; McKelway v. Cook, 3 Green's Ch. R. 102; Deare v. Carr, 2 Green's Ch. R. 513; Read's adm'r v. Cramer, 1 Green's Ch. R. 277.

Mr. Dalrymple, for complainant, contra, cited 1 Story's Eq. Jur., § 152, 155; Green v. Morris & Essex R. R. Co., 1 Beas. 165; S. C., on appeal, 2 McCarter 469; Stotesbury v. Vail, 2 Beas. 390, 394.

THE MASTER. Upon the filing of the complainant's bill, and the affidavits annexed thereto, an injunction was granted according to the prayer of the bill. The defendant, having filed his answer, now moves to dissolve the injunction, upon two grounds. 1. That no sufficient ground for injunction is made by the bill. 2. That the equity of the bill, if any, is met and defied by the answer.

Let us examine the first ground. The bill states, that 🔿 or about the twenty-seventh of November, 1863, the complainant made an agreement with the defendant, to sell ardeliver to him twenty-five hundred tons of iron ore, at mine, then and still owned by the complainant, situate up a certain lot in the township of Sparta, in the county Sussex, in this state, containing thirty-two acres or ther . That immediately after the terms of sale had be agreed upon betwen the parties, the complainant wrote memorandum of the same, and read it to the defendant, w assented and agreed thereto, but that this memorandum w= not signed by either of the parties, it being supposed by th complainant that the agreement was to be a verbal one, ar the memorandum being made by him, so that there mig not, thereafter, be any dispute about the terms of the agre That a few days thereafter, the complainant, w resided at Easton, Pennsylvania, received, by mail, from t defendant, who resides in Morris county, in this state, two

copies of a written agreement, under seal, and executed by the defendant, purporting to contain the said agreement for the sale and delivery of the ore. That the complainant, conceiving that the said agreement was not truly set forth in said written articles, declined to execute them, and returned them to the defendant. That the complainant then drew out, at length, two copies of the agreement, as he understood it to have been made, and having signed one of them, forwarded them to George Richards, with directions to procure the signature of the defendant to the other, and then deliver to him the copy which the complainant had signed. That Richards did so, and returned to the complainant the copy so executed by the defendant.

The agreement, as so executed, is set forth in the bill, and the complainant thereby agrees to sell to the defendant, "at the Ogden mine, Sussex county, New Jersey, twenty-five hundred tons of good, merchantable iron ore, at the rate of one hundred tons per week, commencing first December, 1863." And the defendant agreed to pay for the same, two dollars and fifty cents per ton at the mine, and to take away the same at the rate of one hundred tons per week, and to Pay for the same weekly, at the mine.

The bill further states, that the complainant meant and intended by "the Ogden mine," in the agreement mentioned, the mine on the said thirty-two acre lot, and no other, and that it was expressly agreed upon and understood, prior to the making of said memorandum, and prior to drawing and executing the written agreement, set forth in the bill, that the twenty-five hundred tons of ore were to be mined and taken from the mine on the said thirty-two acre lot, and no other, and that the defendant so understood the contract and agreement, and could not have understood otherwise. That the vein of ore upon which said mine is situated, extends in length, at least one and a quarter miles, and upon it are several mines, pits, or excavations, from which iron ore had been taken at the date of said agreement, although the only mine ever owned by the complainant in

Sussex county, is that upon the said thirty-two acre lot-That there is a mine upon the same vein, upon a seventyfive acre lot, which, at the date of said agreement, belonged and still belongs, to Joseph G. Fell, but which, for about si: months, then last past, had been, as a matter of convenience to said Fell, worked in the name of complainant, although he had no interest in it. That said seventy-five acre lot ac joins said thirty-two acre lot, and was formerly owned by That complainant has never resided in Ne-Jersey, and at the date of said agreement was not acquainte with the particular names by which the different mines i the said vein of ore were designated, but he had alway called, and heard called, the mine on said thirty-two acz lot, "the Ogden mine," and by no other name, and he sul posed that the use of that name in the agreement woul refer to the mine on said thirty-two acre lot, inasmuch ask neither owned, nor controlled, any other mine on said vein . ore, or elsewhere in that vicinity. That before and at the time of making said agreement, the defendant was well aquainted with all the different mines on that vein of ore, ar with their condition, value, ownership, and particular name and designations. That the defendant knew that the contrabetween them referred to the mine on the thirty-two acre |c yet he did not intimate or suggest, at any time prior to the ex cution of the said written agreement, that said mine was n correctly designated as "the Ogden mine." That durit the negotiations which led to the making of said contract, being known that the mine on said thirty-two acre lot w then filled with water, and could not be worked immediatel and the defendant desiring to have ore to use at his forge. was further agreed between them, that the complaina would make an arrangement with Mr. Fell, the owner of the mine on the seventy-five acre lot, by means of which the d tendant could be supplied with ore, at the rate of one hu. dred tons per week, until the complainant could put the mine on the thirty-two acre lot in working order, and I ready to deliver the ore there, after which the complaina

was to deliver the ore at the mine on the thirty-two acre That the complainant did make such arrangement with Mr. Fell, and by means thereof, the defendant was supplied with ore at the mine on the seventy-five acre lot, at the rate of one hundred tons per week, from the first of December, 1863, until about the twenty-third day of January following, when the complainant, having put his mine on said thirty-two acre lot in order, was prepared to deliver, and offered to the defendant to deliver to him there, the residue of said ore. That the defendant, after his workmen and carters had taken away about thirty-six tons from the mine on the thirty-two acre lot, refused to take any more at that mine, and insisted that he was entitled to have the residue of said twenty-five hundred tons of ore delivered to him at the mine on the seventy-five acre lot, alleging that the Ogden mine is the one on the seventy-five acre lot, and that the mine on the thirty-two acre lot is called the "Sharp mine."

But the complainant insists to the contrary, and alleges that the contract made between them was for the delivery of the ore at the mine on the thirty-two acre lot, and no other, and that in drawing and executing the written agreement he believed that the name, "Ogden mine," designated the mine on the thirty-two acre lot, and that if that name does, as defendant insists, apply only to the mine on the seventy-five acre lot, that there was a mistake made in drawing said written agreement, and that the mistake ought to be corrected.

The defendant has brought an action at law upon the ritten agreement against the complainant, for non-delivery the ore at the mine on the seventy-five acre lot, and included to insist and prove that "the Ogden mine" is on this at named lot, and the prayer of the bill is that the agreement be delivered up to be cancelled, or that it may be corted, by striking out the name "Ogden mine," and inserting lieu thereof "the mine of said Firmstone in," or words to the effect, and that in the meantime the defendant may be envolved. II.

joined from setting up or attempting to prove, in said suit at law, that said agreement is, or ever was, an agreement binding the complainant to deliver said ore at any other mine than that on said thirty-two acre lot.

Annexed to the bill is an affidavit of said George Richards, in which, among other things, he states that he was present at the making of the agreement between the parties, and that the agreement was to deliver the ore at the mine on the thirty-two acre lot.

Taking the facts as stated by the bill, it is a case of mistake, made in reducing to writing an agreement previously entered into by the parties, so that in consequence of such mistake, the complainant on the face of the written articles appears to be bound to do, what in truth and in fact he never contracted or agreed to do. And the defendant is seeking, by a suit at law, to take advantage of such mistake and to recover damages against the complainant for not periods.

forming that which he did not agree to perform. In Smith v. Allen, Saxton's R. 53, in which it was alleged in the complainant's bill, that in a bond on which a suit hac been brought at law, there was a mistake, which was an obstacle to recovery by the plaintiff, and therefore praying have it corrected, to enable him to recover in that suit, the Chancellor said: "That a defendant may set up and avail hi self of a plain mistake in a written agreement, and there : relieve himself from the operation of the agreement, is principle too well settled in courts of equity to be shak at this day. It would be a waste of time to enumerate t authorities." The Chancellor then proceeds to show th not only is the defendant entitled to this relief in equity, b that the plaintiff is entitled to the same assistance, to enal him to recover, when he is prevented by reason of a mistal in a written agreement.

So in Henkle v. Royal Exchange Assurance Co., 1 Vesey, ser-317, where the bill was filed to have a policy of insuran rectified, which by mistake had been so drawn that the warranty was from London, whereas, as it was insisted, it should

re been from Ostend, the court said: "No doubt, but this art has jurisdiction to relieve in respect of a plain mistake contracts in writing, as well as against frauds in contracts, that if reduced into writing, contrary to the intent of the arties, on proper proof that would be rectified." The same of the is laid down in the following cases. Skillman v.

Teeple, Saxton's R. 232; Hendrickson v. Ivins, Ibid. 562; Fillespie v. Moon, 2 Johns. Ch. R. 585; Lyman v. United Ins. Co., 17 Johns. R. 377; 1 Story's Eq., § 115.

The case, therefore, as stated by the complainant in his bill, is one which entitles him to relief in this court, and the injunction was rightly issued to restrain the defendant until the matter could be fully heard and investigated.

But the defendant insists further, that even if the case made by the bill shows sufficient grounds for an injunction, yet that the equity of the bill is fully met and denied by the answer, and that therefore the injunction should be now dissoived.

The answer states fully and distinctly that the agreement was not for ore from the mine on the thirty-two acre lot, but that it was for ore from the mine on the seventy-five acre lot, and no other, and that the mine on the seventy-five acre lot is the "Ogden mine," and that the mine on the thirtytwo acre lot is called the "Sharp mine." And it denies that there was any mistake made in reducing the agreement to writing. It also states that the taking of a portion of the ore from the mine on the thirty-two acre lot by the carters and workmen of the defendant was without his knowledge, and that as soon as he knew of it, he forbid it, and insisted that he was entitled to have all the ore from the mine on the seventy-five acre lot, which is richer and more valuable than that from the other mine. A considerable portion of the answer contains matter not responsive to the bill, and which cannot, therefore, be considered on the present motion.

That part of the bill which states that the agreement was for ore at the mine on the thirty-two acre lot, and no other, and that there was a mistake made in reducing the agreement

to writing, is met and fully denied by the answer. terial part of the bill, and without which, an injunction could not have been granted. Yet it must be observed that the affidavit of George Richards, annexed to the bill, states that he was present when the agreement was made between the parties in regard to the ore, and that it was for ore from the mine on the thirty-two acre lot, and not from the mine on the seventy-five acre lot. This testimony and the complainant's statements in the bill agree on this important point, and there is nothing to weigh against them, but the answer of the defendant, which is not supported by any testimony, nor does the answer state that there were no other persons but the complainant, and Richards, and the defendant, present at the making of the agreement, or that if present, the defendant could not procure their affidavits to what really took place at that time.

But granting that on this part of the case the equity the bill is met and denied by the answer, it does not follow that this court will, of course, dissolve the injunction. The court may, in its discretion, retain the injunction until the hearing, if the circumstances of the case, and justice between the parties, require it. Merwin v. Smith, 1 Green Ch. R. 182; Chetwood v. Brittan, Ibid. 438; Fleischmann, Young, 1 Stockt. 620; Stotesbury v. Vail, 2 Beas. 390.

If the injunction should be now dissolved, and De Camshould proceed in his suit at law, and recover damages again the complainant, and it should in the end appear that therwas a mistake in reducing the agreement to writing, alleged by the complainant, and that the complainant oughto be repaid the damages so recovered of him, no good would arise to either party, and the trouble and expense of the litigation at law would have been worse than useless. If the injunction, on the other hand, is retained until the hearing, and it should then be decided that there was no mistake, and that the complainant is not entitled to relie he would remain liable upon his contract, and it could then he enforced against him. It was not suggested upon the and

gument, nor does it in any way appear, that if the injunction be continued, the rights or interests of De Camp would be endangered by the delay necessary for the investigation of the case in this court, nor that there is any reason to apprehend that Firmstone is insolvent, or irresponsible, or likely to become so. He, nevertheless, by his counsel in open court, upon this argument, tendered himself ready to give security, if required, for such damages as De Camp may eventually recover against him (if any) for breach of the agreement, and for all loss and damage which De Camp may suffer from any delay arising from the proceedings in this court.

Upon consideration of the whole case as it is now presented to the court, I am of opinion that the present motion should be denied, and the injunction retained until the hearing, (the costs to abide the event of the suit,) and I respectfully advise the Chancellor to make an order accordingly.

WILLIAM FIRMSTONE vs. EDWARD DE CAMP.*

This cause was argued on final hearing, upon the pleadings and proofs, before Beasley, Chief Justice, sitting for the Chancellor.

l. Equity will correct a clear mistake in a written agreement, so as to conform to the understanding of the parties at the time of its execution.

² The injunction which issued upon the filing of the bill, so far modified as to permit the defendant to proceed with his suit at law, but restraining him from setting up at the trial, any other construction of the contract than that adopted by this sourt.

^{*}This opinion was delivered at May Term, 1867. Though out of its chiohological order, it has been thought advisable to publish it immediately
following the opinion upon the motion to dissolve.

Mr. Pitney, for complainant.

Mr. Vanatta, for defendant.

BEASLEY, C. J., sitting as Master.

This bill is brought to reform an agreement, on the ground of mistake. The agreement in question is in writing, dated the 27th of November, 1863, and signed by the complainant and defendant. Its substance is a stipulation on the part of the complainant to sell to the defendant, who agrees to buy twenty-five hundred tons of good merchantable iron ore, for a certain price, "at the Ogden mine, Sussex county, New Jersey." The alleged mistake consists in the use of the

designation "the Ogden mine." It appears from the pleadings and proofs that, at the time of the inception of the agreement, the circumstances were these: the complainant was the owner of a mine and trace of land containing thirty-two acres, this mine was then fille with water, not having been worked for some years. in strictness known as "the Sharp mine," though it appea the complainant had never known it, or heard it, called Within about one hundred and fifty yards this mine of the complainant, was another mine called "t Ogden mine," on a lot known as the seventy-five acre trac which was the property of a Mr. Fell, but the mining oper tions upon which, were carried on in the name of the cor Both these mines were on the same vein of o and there was some evidence to show that each, by some persons, was called "the Ogden mine."

The insistment of the complainant is, that in the contrain question, by the expression "at the Ogden mine," meant to refer to his own mine on the thirty-two acre tracwhereas, the defendant contends, that the designation appliand was so understood by him, to the "Ogden mine" propon the seventy-five acre tract.

A careful collation of the evidence has led me to the belth that the complainant has fully established his case. The

are many minute facts and indications in the evidence upon which I shall not touch, as it would be tedious and unprofitable to do so, but which, nevertheless, have conduced to the formation of my opinion. A few of the more important Particulars, which have had great weight with me, are these:

1. The draft of the agreement, in the hand writing of the defendant, I regard as entirely inconsistent with his present Pretensions. This paper bears date on the 18th of November, 1863, and a few days after that date it was presented, by the defendant, to the complainant for his approval. This draft, like the agreement which was afterwards executed, and which is now in controversy, calls for the delivery of twenty-five hundred tons of merchantable ore "at the Ogden mine."

Now the question arises, how did the defendant come to draw a contract with that provision in it? for, on the hypothesis which the defendant has endeavored to support in the Proofs, I confess that to my mind, this point presents an inscrutable mystery. The incongruity is here. The defendant, in his deposition, in the most explicit terms, alleges that the actual agreement between himself and the complainant, was that he should have the ore taken from the mine on the thirty-two acre tract, or from that on the seventy-five acre tract. On this head he is too clear to be mistaken. ing of the interview between himself and the complainant, he says: "I insisted upon having the 'Ogden mine' ore, as a Part of the consideration of the seventy-five acre lot, at two a half dollars per ton. He declined for a considerable time to do so, but afterwards stated that himself and Mr. Fell anticipated uniting the two lots and working them in Partnership, and that, when they should do so, he would represent to Mr. Fell that he had made a verbal agreement with me, to the effect that I should have the said amount of ore from any part of the two lots that they should be working, and that it should be good merchantable ore." This Proposition, he goes on to state, was accepted by him, and this arrangement, according to his alleged understanding,

was in no respect modified up to the moment when he presented himself to the complainant with the draft of the agreement in his hand. It will be observed, therefore, that the verbal agreement, as stated by the defendant himself, was that the ore should come from "any part of the two lots" that should be in working, while the draft of the agreement, made by the defendant, confines the right of delivery to one of the two lots. It is, I think, therefore demonstrably clear, that the defendant did not frame his draft of the agreement upon the model of the understanding testified to in his deposition, and which, he would have the court believe, had undergone no change. This paper, therefore, under the defendant's own hand, bears strong evidence against the version which he now seeks to put upon the transaction.

2. But, on the other hand, this same paper strongly corroborates the case made by the bill, and by the testimon taken in the cause on the part of the complainant. I attribute this effect to it, for the reason that, if we give to the expression "at the Ogden mine," the meaning for which the complainant contends, we have an agreement in the ham writing of the defendant, which is agreeable in every respect to that understanding which is attested to by the complainant, and which is in harmony with all the evidence, with the exception of the deposition of the defendant himself.

I have shown that the paper in question has no prototy; in the arrangement between these parties, if we are to local for that arrangement in the testimony of the defendan. Let us see how it stands with respect to the opposite theory.

The complainant, in his deposition, thus expresses the substance of the interviews which preceded that in which the drafted agreement was brought to him. His words are "He, the defendant, wanted five hundred tons of iron or and I told him I was not working my lot—I could not laim have it. That I could not start the lot to get out on five hundred tons. That, if he would take twenty-five hundred tons, I would see about starting it. He then said

nsider on it, and let me know." And in a letter y the complainant to his agent, Mr. Richards, and worthy of much consideration, as it shows the aneous views of the writer, he states the agreehe same effect, as follows: "De Camp was on here sursday. I told him I had no intention to start and certainly should not, to get out only 500 tons. did not work the mine for five years, he would get That if he would take 2500 tons at \$2.50 t all. ould start the mine, and take it out at the rate of per week. He said he would let me know in a In addition to this piece of evidence, we he case a letter from Mr. Richards to the complainming him that he had seen the defendant, who said ncluded to accept the above mentioned offer. Those ere not objected to before me as evidence, but were both parties on the argument, and they show with what, at the time of the transaction, was the imon the mind of the complainant, according to this

then, was a distinct offer of the ore to be taken complainant's mine, in a certain time and in a given; and in a few days afterward, the defendant prehe complainant his draft of the agreement, which y embodies and harmonizes with such offer, if we complainant's views touching the meaning of the tion, "Ogden mine." Giving credence to the testithe complainant, and taking his definition of the scriptive of the mine, the draft of the defendant is nscript of the agreement as attested on the side of lainant. But if we believe the defendant, such tains a contract, which he, himself, does not precomplainant had ever assented to, at the time he dit to paper.

apprehension, this evidence, standing alone, would decisive. No explanation has been offered on this he defendant says, that in that last interview, the

complainant drew off the terms embodied in the ment, but he appears to have entirely forgot himself, had previously put in writing his own understanding. What the complainant really put in pencil, on the back of the draft drawn be ant, the form of the contract, which was a muthat framed by the defendant; the alteration principally in the times of payment, and the in a clause of forfeiture.

- 3. The testimony of Mr. Richards, with reg took place in his presence at the interview be parties, where they both agree the final arra made, is also most material. If that evidence case of the complainant is entirely established. carefully through the deposition of this witnefound nothing which tends, in any respect, to slidence in either his intelligence or veracity. Hi in many important respects, are confirmed by which are exhibits in the case.
- 4. I also consider the conduct of the comple diately following the execution of this contract indicative of the construction he put on the ag is clearly shown that he proceeded at once to di and put it in working order. He gave instrusuperintendent, to let the defendant have ore f enty-five acre tract until the ore could be ta mine in his own lot. I have said these arrang made and instructions given, as soon as the con ecuted. Why was this course taken? that upon signing this agreement, he immediate to take steps in fraud of it? It affirmatively the complainant was under no legal obligation t the agreement in question, and it seems, therefor ous to attribute to him a design, almost cotempo the execution of such agreement, to lay measur

it. And yet to sustain the defence, we must believe such an anomaly existed.

In view of the whole of the evidence, I conclude that in the agreement or controversy, the terms "Ogden mine" were intended to signify the mine on the lot of the complainant, and that they were understood in that sense by both the contracting parties. Nor in coming to this result have I overlooked the well settled rule of this court, that in a case of this nature the proof must be clear, so as to leave the mind free from all obscurity or doubt. In my opinion, the testimony before me, when carefully examined and weighed, leads the mind to this point and demonstration. Owing to the use of ambiguous terms of description, this contract, as it now stands, contains a stipulation which, at the time it was assented to, was aside from the intention of both the Parties to it; and now, contrary to the justice of the case, one of such parties is endeavoring to take advantage of such verbal obscurity. It is obviously within the ordinary jurisdiction of this court, to prevent such an abuse. The contract should be rectified so as to import that the ore, forming the subject of the sale, is to come from the mine upon the lot of the complainant.

The injunction should be modified, so as to permit the defendant to proceed with his suit at law, if he deems such course advisable, and restraining him from setting up at the trial, any other meaning of the contract than the one above indicated.

As this case was argued on final hearing, I have no authority to sign a decree, but I hereby respectfully advise his honor, the Chancellor, to make a decree in conformity with the above views.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW JERSEY,

FEBRUARY TERM, 1866.

CATHARINE V. B. ADAMS vs. ALONZO W. ADAMS.

- 1. Query. Whether desertion would be a valid plea to a bill for divorce on the ground of adultery. But, admitting that it would, it is necessary that such desertion should exist for the uninterrupted period of three years.
- 2. Witnesses of questionable character are to be relied on, in any judicial proceeding, only so far as their testimony is intrinsically probable. or is corroborated by circumstances.
- 3. Where, upon a bill for divorce on the ground of adultery, the direct evidence, though insufficient of itself to support the charge, is sustained by the proved habits and character of the accused, as well as the strong probability of corroborative facts, the complainant is entitled to a decree.

Mr. Isaac W. Scudder and Mr. Zabriskie, for petitio 12er.

Mr. C. Parker and Mr. Bradley, for defendant.

Beasley, C. J., sitting as Master.

This is a suit brought by a wife against her husband for a divorce, on the ground of adultery. The facts stated in

petition are, in substance, to the effect following, viz. t the parties were married on the 27th of May, 1854; t they resided with the mother of the wife, in Jersey City, il March, 1855, when they removed to New York, and mined there until February, 1861, when, it is alleged, the band failing to provide a sufficient support for the wife, was compelled to leave him and return to the parental se, where, with her only child, she has been supported per mother ever since; that the defendant, in August, 1, joined the army of the United States, and went to the of war, and was, till the commencement of this suit, ened in active service, having no house, home, or fixed e of residence. Then follow articles of crimination, chargthat the defendant, at divers times in the months of rch and April, in the year 1864, in the city of Albany, imitted adultery, in the language of the pleading, "with ers persons, whose names are unknown to your petitioner; also, especially, that he did, on the twenty-second, twentyrd, and twenty-fifth days of March last aforesaid, commit Iltery in the Delavan House, in the city of Albany, in m numbered 150 in said house, with a woman whose ne is unknown to your petitioner." There is also a further cification of other criminal acts, which, as they are not impted to be proved, it is not necessary to notice. ition concludes by praying for a dissolution of the marse, and for the custody of a female child, born of this riage, who is in the eleventh year of her age. wer denies the adultery, and also the fact that the wife the defendant on account of his inability or neglect to utain her.

he evidence which has been taken is excessively volumis. A considerable portion of it, however, relates to a ect which is no longer in controversy, so that it can be aside with a single remark. The petitioner endeavored how an adulterous act, on the part of the defendant, in state of Maryland. The allegations on the record, taken of II.

in their widest scope, did not embrace this transaction, for

the place laid was the city of Albany; nevertheless, the :: effort was made to prove the defendant's guilt at this distant theatre. The attempt proved abortive, but I cannot think that the significance of this portion of the case altogether ceases with its rejection on the ground of its falsity. The narration of the witness on this part of the case, who was introduced in behalf of the petitioner, was clear, circumstantial, and complete; if her testimony could not have been overcome, the defendant must have been pronounced guilty-But it has been clearly shown that the character of the witness was bad, and there is every reason to believe that many of the most important circumstances stated by her are I think that the refutation of her story should be regarded as complete; and, therefore, with this conviction. I passed from its further consideration at an early stage ix my examination of the proofs. But the remark which have to make upon this subject is, that, although I easily dismissed this evidence as unworthy of credit, a certain i pression, which its presence in the cause created, remain I felt this witness had deceived the petition and her counsel, and it was impossible to avoid the unpleases ant suggestion that there might be others, in a case li 🛌 I this, who might go a step further and mislead the court. have not been inattentive to the admonition of this circu stance, but have been conscious of a bias against the other parts of the case set up by the petitioner, and if such parts have not been regarded with suspicion, they have, at leabeen subjected to the severest scrutiny. There is also another feature in the mode in which the

evidence has been presented, which cannot be passed without notice. It is this. Much of the evidence taken on behalf the defendant, has been introduced without any regard the rules regulating the examination of witnesses. As matter of mere form, I might, inasmuch as it appears the defendant, for the greater part, acted for himself in the absence of his counsel, be content to overlook, in silence, the

from correct practice. But the error so often id exhibits itself in so gross a form, that it in fact not merely to the non-observance of a formula, but us impediment to a just estimation, in many particle of the value of the testimony. Numerous instances a observed, in which questions have been propounded ct and suggestive a form as entirely to deprive the with regard to many important points, of all relict. In some cases, I have even doubted whether positions should not be suppressed; and although I I to retain them, it was with no intention of relying as independent proof, but only so far as they apbe sustained by other testimony. To regard them his point, I should esteem an act of injustice to the

are some general aspects of the case to which my has been directed, which it is proper that I should f before proceeding to a consideration of its merits. st and most important of these is the objection the argument, that the petitioner is not entitled on nt occasion, to a standing in this court, on the ground herself, was, at the time she commenced this suit, a violation of the matrimonial contract, by her def her husband. It was insisted that the husband p this dereliction of duty by way of recrimination, it is a full defence to the present action.

w upon this subject is perplexed. There can be no at the adultery of a complainant can be pleaded as a suit for a divorce grounded on the same offence. the authorities, English and American, are agreed. rsity begins in the consideration of the particular, the proof of an offence of a lesser moral grade will same effect. In the English ecclesiastical courts, a modern times, it appears to be settled that cruelty pleaded in bar to a charge of adultery. Harris 1, 2 Hagg. Eccles. R. 376; Cocksedge v. Cocksedge, 1, 290; Chettle v. Chettle, 3 Phill. Eccles. R. 507.

There can be no doubt, that desertion would, before these courts, be put upon the same footing. But there is an American case impeaching this doctrine, and Mr. Bishop appears to consider the question an open one in this country, on the ground that there existed, at the time of the Revolution, no authority ruling the point, and that it is not entirely consist—ent with analogous principles in the law. Nagel v. Nagel, 1 Missouri 53; Bishop on M. & D., § 396, 403.

It certainly seems somewhat unreasonable to discriminate between offences which the statute, so far as touches the rights of the parties, springing out of the matrimonial con tract, has put upon the same level. Adultery, desertion, an cruelty have, by the law of this state, the same consequence attached to them; that is, either of them affords a cause for = divorce, and why the one should not be sufficient as a recrim = natory plea to a charge of either of the others, is not ver readily perceived. But it is not, in the present case, at all necessary to decide this question, for there can be no pretence that the statutory offence of desertion has been com-For, admitting that desertion mitted in the present instance. is a good plea to a charge of adultery, there seems to be no ground to doubt that such desertion must exist for the statutory period of three years before it can be so used. this occurs, no legal offence can have been committed. would hardly be pretended that the wilful desertion by 8 husband, for a week, or a month, would enable his wife commit adultery with impunity, so far as concerned And yet this is the principle u mon matrimonial connection. which this defendant must stand, if his recrimination is to did prevail, for the separation between himself and his wife not continuously endure for the period which would com-The pleadings admit hat tute just ground for a divorce. the complainant commenced to live with her mother, a art from her husband, in the month of February, 1861, and hat in the following winter she cohabited with him for a smort period of time, in the city of Washington. The petition, in this cause, was filed on the 6th May, 1864. If, consequer tly,

separation between the husband and wife, in this case, s of a character to constitute desertion within the intent the statute, it was not of sufficient continuance to form a ound of divorce on the application of the husband, and for like reason, cannot be interposed as an adequate answer, way of recrimination to this proceeding. But in point of t, I have not perceived any evidence before me, from which inference could, with any degree of propriety, be drawn, t the wife, in the present case, when she last parted from husband, left him against his consent. The petition tes that she went to her mother's, because the defendant not provide for her a sufficient support. The answer lies this statement, and imputes the absence of the wife the instigation of her mother. But the answer does not set such absence as a wilful and continued desertion; it has, ther in form, nor substance, the semblance of a recrimiory plea. But even if it presented this aspect, it would have been evidence in the cause, and as there is no evi-Ice which elucidates the point, there is no warrant to con-It the separation, which, it is admitted, existed, into a sertion, of which there is no proof. The defendant, himf, has proved, that about a year after this separation nmenced, his wife voluntarily left her mother's house, and ne to him in Washington, where they cohabited for several 78, and until his military duties called him to the field, en they parted with regret. It is clear that, when they is separated, the husband knew his wife would return to · mother's, and yet he made no objection, and did not iress a wish, so far as appears in the case, that she should elsewhere. From that time to the filing of the petition this cause, there is nothing in the evidence to induce a ief that the defendant ever, on any occasion, expressed desire that his wife should leave a home to which she 1 gone, certainly with his acquiescence, if not consent. It obvious that such a state of circumstances does not preat any of the legal characteristics of a desertion. I conade that there is nothing in this point.

The next general topic alluded to by counsel, and on which much stress was laid, was the allegation that this suit had not originated with the petitioner, but had been promoted, against her wishes and conviction of right, by her mother.

But the case, I think, is destitute of all evidence to sustain this hypothesis. It does, indeed, appear that this lady has at times expressed great abhorrence of the defendant, and has been vehement in her denunciations of his conduct. But in judging of her, in this respect, her position relative to him must be taken into account. In the year 1853, the defendant was introduced into her family. She had then living but one child, the petitioner, who, as the only descendant of a wealthy family, had large expectations. The defendant, immediately upon his introduction, addressed her. A number of his letters, received during the period of this courtship, are among the proofs. They are addressed to the petitioner, or to her family, and they purport to come from different places in the south. They describe the journeying and adventures of the writer; he is at one time exposed to the cholera; a traveling companion in the same vessel dies. and is hurriedly buried in a "desert place" on the shore of the Mississippi; the defendant has made his last will, leaving his entire estate to the petitioner, "excepting only ten theorem sand dollars," which has been given to a nephew them college in Tennessee; he is then hurrying away to Orleans to save a large amount of gold dust, on deposit banking-house, which he has been credibly informed w fail within a few weeks. It is not necessary to dwell lonon these details. He is married to the petitioner. They rewith her mother nearly a year. He expresses his desir put up a costly dwelling-house as a home for his family, his mother-in-law, for this purpose, conveys to him a t of land; this he raises money upon by mortgage. with his wife goes to boarding in New York. elapses, and then comes the discovery; the defendant not a man of property; he had not traveled, as he preten from place to place in the south; he was a mere imposs

and his letters were, from first to last, a deception and false-hood. But this was not all: it was further ascertained that at the time he had engaged himself to the petitioner, he was the husband of another, and that there was every reason to suppose that when he offered himself in marriage to his present wife, he was on his bridal tour with his first. He was divorced on the 26th of April, 1854, and on the 27th day of the following month, was married to the petitioner. It was thus that this defendant stood revealed to this lady, the mother of the petitioner; she could not do otherwise than regard him as a man destitute alike of honor and of truth; as a mere adventurer, who had entrapped her daughter into the degradation of marriage with himself by the use of the lowest arts.

Under these circumstances, she appears to have received information that induced her to believe that the defendant had a wife living in California. It was not unnatural that she should give easy credence to such an accusation, and accordingly she had the defendant prosecuted for bigamy. is at this point she is assailed by the evidence in this case. The charge is, that she endeavored to suborn two witnesses in this criminal prosecution, both of whom have been examined as witnesses in the present suit. It is obvious that this crimination has nothing to do with the case now before me, and the whole of the testimony with regard to it should be suppressed. But as it has been obtruded among the proofs, I will, in passing, remark, that since the hearing I have read it carefully through, and am entirely satisfied that it fails to raise even the slightest suspicion against the person it attempts to inculpate, for the evidence adduced in its support is the kind which, of all others, is least likely to make any impression on the mind of a person of experience. And looking beyond this line of evidence, there is absolutely nothing upon which to rest the accusation which was the principal theme of declamation on the argument, that the mother-in-law, and not the petitioner, is the real actor in this case. It is true that she has not disguised her desire

to see her daughter divorced from the defendant; but this is a feeling which, in view of the preceding narration, can neither elicit suprise, nor provoke censure. Besides this expression of opinion, my memory does not recall any circumstance of the least significance, which connects this lady with the present suit. There is no evidence to justify the conclusion that this suit is the mere creature of her will.

Leaving this topic, I proceed then to consider, as briefly as possible, the merits of the case.

The charge which is relied on, and which it is insisted ha been sustained by the evidence, is, that the defendant, o some day in the month of March, in the year 1864, ha criminal intercourse, in room number 150, in the Delava n House, in the city of Albany, with a woman by the name of In proof of this accusation, this woman, the Louisa Butts. particeps criminis, was examined, and her statement, in its substantial parts, was given in the words following, to wit. "I first met him (Col. Adams) in Albany, in Eagle street, between Pine street and Maiden lane; it was on the twentyfifth day of March last. I was going along Eagle street, in company with a gentleman, when I met the colonel, and he bowed to me. I looked back, and he waved his handkerchief at me, and crossed over towards me. He asked me if I saw company; I told him I did. He asked me if he could see me; I told him he could. He wanted to know where be could see me; he wanted to know where I was living, and he could call at my house and see me. I told him I did not receive company at my house; that I was living with father and mother. He wanted to know if I would meet him that evening; I told him I would. I met him that night at eight o'clock, at the corner of Eagle and State street He asked me if I would go to the Delavan House, and go the private entrance and inquire for Colonel Adams; that would see a negro there who would show me his room: that he had fixed it all right with him. I went to the Delavasu House, and saw the colored man; inquired for Colone! Adams; he took me to Colonel Adams' room; Colonel

ns was not there when I first went there. I turned, and went down stairs, and stood talking to the colored and while I was talking to the colored man, the colonel along, and asked me if I would go up to his room; I him I had been up, that the room was locked; he said is all right now. I went up stairs with the colored man, showed me the room 150. I was in the room a few ites, and Colonel Adams came in. He asked me to unsand go to bed, which I did. He asked me if I was all i; I told him I was. We went to bed together, and the iel had connection with me."

confirmation of this narrative, the colored man red to by this witness, and who it is alleged, admitted into the Delavan House, was produced. His name is Johnson, and his story goes to the effect that the deant, on the evening in question, applied to him to pass woman through the private entrance of the hotel, of the was in charge; that he consented, and accordingly duced her in the manner, and at the time, described by in her evidence.

his is the direct and principal proof in the case, and of se, if it is to be implicitly relied on, the guilt of the deant is established. But that such is not the quality of evidence, is at once apparent. No one can doubt for a lent, that the testimony of both these witnesses must be ived with distrust, and weighed with great caution. female belongs to the lowest grade of prostitutes. Her ts and associations have been for years, offensively low profligate. Her character for truth has been success-impeached. Neither does the reputation of the male ess entitle him to the unimpaired confidence of the court. In at the best, his character is such as to awaken suspi-

Numerous witnesses have deposed that they would believe him on oath; many others have expressed a conopinion. The truth, I suppose, is, that he has no
dished reputation either one way or the other, and that
many persons in his condition in life, he is addicted to

Adams v. Adams.

the minor vices. By his own admission, he was in the constant habit of pimping for whoever made application to his Such witnesses, it is clear, are to be relied on in any judicial proceeding, only so far as their testimony is intrinsically probable, or is corroborated by circumstances. I have scrutinized, therefore, with a great deal of care, the deposition of this man, Johnson. I have read and re-read it since the argument, and, although on my guard against it on each occasion the impression has become strengthened that it bears within itself many strong indications of truth If untrue, it is a story devised and narrated with strange skill. Though minute in its details, and though the cross examination was most elaborate and rigorous, it is entirely consistent, in all essential particulars, with the deposition o the woman, Louisa Butts. It is to be noticed, as a matter of considerable significance, that this witness, Johnson, wa present during the examination of this woman, and that instead of repeating her statements, and confining himsel closely to them, which is usually the case when a story is t be told in concert, he enters upon a narration, which, while it sustains her evidence in all material respects, superadd many particulars, which, when examined, appear well calcu lated to have impressed his mind, and yet which, we can readily suppose, did not arrest her attention, or which migh naturally have escaped her memory.

A few examples will serve to explain this observation. Thus, he says, when Louisa Butts came to the private entrance, he asked her if she knew what floor she had to go on and she said, no; that he told her they had to pass the house keeper's room; that he instructed her to wait there a few moments while he went to see if the road was clear; the he went up the back way, and found the door locked; the returned and told her there was a great risk to run, the every one of the servants knew who she was, and if he we caught he would be turned away; that in passing the house keeper's room she came out and looked, and after pointing out to his companion the chamber of the defendant, as

ing her enter it, he stole down another way to avoid being stioned; that after Louisa Butts came down they had 1e conversation, which he narrates; that she went away, l in a short time returned, stating she had left her gloves defendant's room, and that he, the witness, at her request, it for them and brought them to her. These are some of details, and I confess it seems to me almost incredible, t this ignorant waiter-boy should have had the marvels boldness and cunning to annex to the statements of the ale witness all these minute particulars, to which she had le no reference. To those who know, from experience reflection, the laws which regulate the human memory, oes not seem singular that several persons, in speaking past transaction, do not each re-produce it, in descrip-, with the same fullness of detail; but such is not the Among the ignorant, the strongest proof of truth of testimony derived from several witnesses, is the that the statements of each is nearly identical with those le others. Hence, the exact similarity which we so often in the depositions of corrupt witnesses, whose evidence been pre-arranged. But in the testimony of these two ons now before me, there are none of the usual marks of No two narratives concerning the same transac-, could be more unlike. It certainly has every appearof being descriptions of the same occurrence, observed different stand-points. Thus, the woman states nothing, cely, beyond her being admitted into the hotel, and going e to the defendant's room; on the other hand, the second ess supplements this statement with a full recital of the 3 and difficulties which beset his part of the undertaking, the means used by him to counteract or avoid them. In judgment, nothing could be more natural than this testiy; it certainly has every appearance of being the truth. sidered in all its aspects, it has left my mind impressed the conviction that it is entitled to very great weight. I should not feel willing, no matter how great the plauity of this testimony, to rest a judgment upon it, unless

supported by other witnesses. The next step, therefore, will be to ascertain how far, if to any extent, this direct evidence has been corroborated.

The first circumstance having this tendency, is the proof

of the defendant's manifest disposition and constant proclivity to the commission of the offence with which he is It has been clearly proved that he was not under any moral restraints whatever with regard to this part of his conduct. Several witnesses speak to the point. Thus, Daniel Benjamin, a waiter in the Delavan House, has deposed to a conversation, in which the defendant made inquiries about a female boarding in the hotel, and told the witness if she was of a loose character, to induce her to come to his room. He further testifies, that at another time the defendant sent him to procure for him a woman of vicious habits, and bring her to his chamber, and that he endeavored to do so, but did not succeed; and that, on a subsequent occasion, at the defendant's request, he took him to an house of ill-fame, where he left him. So, Robert McIntyre, another witness, mentions & conversation of a similar strain, which he held with defendant, and so well does his character in this respect appear to have been understood, that another witness tells us, that he was known among the female servants of the house by the appellation of "the gay colonel." It seems to me that it cannot be denied that this proof of the depraved mind and loose habits of the defendant are strong supports of the direct evidence, for it certainly becomes nowise incredible that he is guilty of the crime which it plainly appears he sought every opportunity to commit.

Next in order in the train of corroborative circumstances, may be properly placed the facts deposed to by the three witnesses, Edward Lee, Daniel A. Hall, and Francis Oatfield. This testimony is very material, for it goes close to the point of the controversy. Edward Lee says, he was walking with Louisa Butts at the time she was accosted in the street by the defendant, and he corroborates her statement touching all the particulars of that meeting. Hall and

thield testify to the fact of seeing this woman, with the nnivance of Levi Johnson, obtain access into the Delavan ouse, through the private entrance, about the time referred After a scrupulous consideration of this part of e evidence, I am unable to perceive any proper ground on nich it can be rejected as unworthy of belief. It is true at neither of the witnesses belong to a class on which a art can implicitly depend. Lee appears to have been a an of a low order and of dissolute habits, and in some irrelant points his evidence has been contradicted. 70 witnesses are colored men; the one, by occupation a aiter, the other a barber. But there is no reason to supme either of them was under any influence which would inine to testify, in this case, falsely. They delivered their stimony, so far as the record exhibits, with propriety, and eir statements are not marked either by inconsistencies or aggeration. The characters of two of them are in no re-And, finally, they depose to facts which ect impugned. e in nowise improbable; for, as we have just seen, from habits of the defendant, what these witnesses say they was not unlikely to occur. The strictures of counsel on s branch of the evidence have not been forgotten; but I ak it would tend to no useful purpose to refer to such critin, except to say that it has received due consideration, that it has not shaken my confidence in the testimony. conclusion is, on the whole case presented by the petiter, that it must be regarded as sustained by satisfactory Ofs, unless such proofs are to be considered as overcome the evidence on the part of the defence.

his forms the last head of inquiry.

The case of the defendant rests, as I conceive, on a single nt, which is, that he did not, at the time referred to by two principal witnesses of the petitioner, Levi Johnson l Louisa Butts, occupy room number 150, in the Delavan use. The time laid by each of these witnesses, it will be nembered, was the twenty-fifth of March, 1864. Vol. II. $2 \, \mathrm{F}$

are both positive upon this point. The female attempts to fortify her position, in this particular, by a reference to a circumstance which, however, is shown by the defendant not to have occurred on that day. The confirmatory witnesses, Hall and Oatfield, stand very nearly on the same point of time. Under these circumstances, the defendant produced witnesses who have established, beyond all reasonable doubt, that on this day, thus laid and adhered to with much pertinacity, he did not occupy the room in question. The elucidations of this subject by William B. Field and David McClosky, the one a clerk, and the other a book-keeper at the Delavan House, place this matter beyond a cavil.

It is clear that the defendant arrived at this hotel on the 22d of March; that he staid on that visit beyond the 25th; and that during that visit he occupied rooms, numbers 38 and 37, and none other. The defence virtually is an alibi, and it is insisted that it meets the whole case, as it extends over the 25th of March, the time attempted to be proved. But I cannot at all agree to this view. Instead of esteeming the matter thus set up an adequate defence, I feel constrained, from various considerations, to regard it as a mere subter-The artifice, I think, is conspicuous on the very face of the facts. It is in proof, that the defendant was at this hotel several times near to the visit to which allusion has just The witness, Levi Johnson, when questioned been made. upon the subject, said that the way he fixed the time of the act of adultery to which he deposes, was by a reference he had made to the books of the house, and that he had thus ascertained when it was that the defendant was put into room, number 150. With regard to the time of the og currence to which he deposes, he thus expressly says he took the book as his guide. In other words, then, his evidence amounts to this, that if the books could be relied on, the act of adultery was committed on the 25th of March. defendant himself shows, by the testimony of the derk, Mr. Field, that when the defendant arrived at the Delavan House, on the 22d of March, this room, number 150, was, in

nt of fact, assigned to him upon the books; but this wits further states, that on account of certain considerations, ich he specifies, the defendant did not on that visit in rety occupy this room. This evidence, as I think, amounts this: it shows that the defendant did not on the 25th of irch occupy room, number 150, and that the alleged act of iltery was not at that time committed in it. But it goes further than this, for if the defendant, at a previous visit, it before the time laid by the witnesses of the petitioner, d possession of the room in question, then manifestly the timony introduced by him on this point, can be of no avail For when the defendant formally proved the fact atever. two witnesses, that on the 25th of March he did not cupy the room, number 150, he was perfectly aware that e hotel book had misled the witness of the petitioner to the time of the occupancy of this chamber, and upon is misconception, he has constructed the whole fabric of s defence. It was impossible for him not to understand at the substance of the case made against him was, whether not, at or about the time specified, he had committed adulry in room, number 150; and possessed of this knowledge, contents himself by showing that subsequent to the 22d of arch he could not have been guilty, because he occupied other chamber. He was aware that the precise time was t important; that Levi Johnson had been misled by the oks as to the precise time, and yet his whole answer the case made, is confined to this mere point of time. e fact be so, he could have had no difficulty in showing that did not inhabit this room at any time towards the close February, or in the beginning of March, of that year; and ch proof would have been, as he must have well known, a inclusive defence to the charge against him. The witnesses alled by him had the books of the hotel under their conol. They were, therefore, able to state whether, during ne period specified, he had been an inmate of this chamber. and it is also a significant fact that both these witnesses were zamined under a commission, and that by the frame of

the interrogatories, they were rigidly confined on the subject, to the period of the visit commencing on the 22d of March. They are both asked to describe the location of room, number 150, but they are not asked if the defendant occupied it. The omission is full of meaning. I can scarcely think it was the result of an oversight. At all events, it leaves the defence entirely inadequate; it is an answer to the letter, but not to the substance of the case proved by the petitioner.

If the case had closed at this point, I should have held the defence a failure; but there is other evidence before me, showing that the defendant did occupy, near the time in question, this room, number 150.

The testimony of Richard J. Page appears to me to put this matter at rest. This witness was a book-keeper in the Delavan House, and he has deposed to the effect that the defendant was at that hotel about the latter part of the month of February, or the beginning of March, 1864, and that a part of the time during this visit, he had a room on the inside of the hall, being a number between 145 and 154 The witness shows that he is well founded in his opinion, by a reference to occurrences, so as to preclude all probability of mistake. In addition to this very weighty evidence, 4be deposition of James Burrowes, has been also introduced which he testifies to a conversation, in which the defend admitted that the woman, Louisa Butts, had been to his ro but alleged that she came to see him with regard to on her relations, who had been connected with the army. conversation thus deposed to, took place prior to the takof any testimony in the cause, and at that time it wo seem that there was no intention to rest the defence on a nial that the woman, Louisa, did visit the room of the defe ant; but this line of defence became obviously impractice under the developments of the petitioner's case, and he the adoption of another theory. But the fact of the adr sion of the defendant, of the presence of this woman in In view o room, remains uncontradicted and unexplained. the evidence on both sides, I think the defendant has suc-

Beded in proving that the act of adultery which he perperated in room, number 150, in the Delavan House, was not ommitted on the 25th of March. This proof cannot in the East shake the case of the petitioner.

But there is still another consideration which bears upon his point, and indeed gives a complexion to the entire de-This is the fact that the defendant has not been ance. xamined as a witness in his own behalf. The case made by he petitioner was one which appeared to render it not only proper, but, as I think, absolutely necessary for the party harged to attest his own innocence. It was the only direct evidence in the way of negation, in his power. However anguine his temperament, he could not fail to perceive the gravity of the case against him. On his own side, he had ittempted to impair the confidence of the court in the evilence of his adversary; but his own oath would tend to the entire vindication of his character. In his position, I cannot but think that his own oath became an indispensable part of any defence which he could interpose, and I should regard its absence, under any circumstances, as a most suspicious incident. But the conduct of the defendant in this respect is open to still graver observation; for he has not only withheld his oath from the case, but he offered himelf as a witness, in a manner which has left no doubt in my nind, that such offer was not made in good faith. ndeavored to give the circumstances a more favorable spect, but, after full consideration, I am unable to see how, xcept by closing my eyes in wilful blindness, I can regard he defendant's conduct in this regard, in any other light han that above indicated.

The offer referred to was made in this wise. On the 27th of November, 1865, the defendant was, in person, before a master of this court, in Jersey City, who for several days previous, had been occupied in taking the evidence offered by him. At the hour of eleven o'clock at night, on the day designated, the defendant, in the language of the memoran-

dum of the master, "proposed to be sworn in the cause. he is compelled to be in Albany the balance of this week, which is the residue of the time allowed him for taking testimony, and that he cannot appear before the master in New Jersey again, before his time expires under the order of the court." The counsel of the petitioner expressed his willingness to go on, but the master, as a matter of course, refused. Now, will any person believe that this offer was made bona fide? What was the business of such importance which compelled the defendant to absent himself? The case silent upon the subject. Why had he not been examined before? He had just been engaged for hours, if not days, in taking depositions to show the hostility of his mother-inlaw to him, and it surely is unreasonable to suppose that he thought these as important to his defence as his own sworn denial of guilt, and the elucidation which he alone could give of the entire case. Besides, a few days after this, the record discloses the fact that he is almost uselessly present by side of his counsel, while witnesses are being examined on written interrogatories annexed to a commission. This entire transaction has left not a particle of doubt in my mind, that this proffer by the defendant of himself as a witness in the cause, was not made in sincerity, but with a perfect js surance that his examination was impracticable. scarcely necessary for me to remark how much an artifice this kind should weigh against its contriver. In my opin ion it falls little short of an acknowledgment that the defend a pt could not deny, under his oath, the offence imputed to him-

Upon the whole case, my conclusion is, that the case of the petitioner is fully made out by the proofs adduced, and that her prayer should be granted. I shall advise his homor, the Chancellor, in accordance with this view.

Randall v. Morrell et al.

E. Browne.

Upon a bill between partners for closing the affairs of a partnership, a dissolution of the firm, the insolvency of the defendant will enthe complainant to the appointment of a receiver, and an injunction.

Where the answer is not responsive to the allegations of the bill, the action will be retained.

A partner, defendant to a bill for an account, will not be allowed to possession of funds to which the firm has claims, until his right have been established by final decree.

have been established by final decree.

The complainant having failed to prosecute his suit with proper dilie, charged with the costs of the motion to dissolve.

This cause was heard upon a motion to dissolve the inction which issued upon filing the bill.

Mr. Ransom and Mr. I. W. Scudder, for defendants, in port of the motion.

Mr. Gilchrist, for complainant, contra.

Bent motion is to obtain its dissolution.

Beasley, C. J., sitting as Master.

This is a controversy between partners. The bill alleges at in the year 1855, the complainant engaged in the comssion business with the defendant, Morrell, and that at a sequent period, the other defendant, Browne, became a mber of the firm. This connection of Browne with the connis denied by him, and as the fact is immaterial to the sent purpose, that denial will be accepted as true. The objects of the suit are to obtain an account, the apartment of a receiver, an injunction to prevent the delant from collecting the debts, or disposing of the property the firm, and to have the partnership affairs wound up ler the surpervision of this court. The injunction, as yed for, was granted on the filing of the bill, and the

Randall v. Morrell et al.

The grounds upon which the injunction was originally obtained, and upon which it is now sought to be sustained, consist principally of allegations of fraud and insolvency on the part of the defendant. These charges are various and comprehensive, and have elicited a voluminous answer, which is deformed by much irrelevant matter. Affidavits also have been taken on both sides, which relate to many minute affairs, not pertinent, and which can have no influence on the decision of the present issue. Not content with endeavoring to repel the imputations of fraud against himself, contained in the bill, the defendant, in his turn, becomes the accuser, and charges the complainant with misappropriations of the funds of the co-partnership, and with other conduct, scandalously fraudulent.

Assuming, as the truth, but a small part of the delinquencies charged by these parties against each other, it is clear that it would be the duty of the court to prevent either from obtaining possession of the assets of the firm, as well for the purpose of enforcing a decent honesty in the settlement of the partnership affairs, as for insuring ordinary justice to creditors. But it is not necessary, nor would it be proper for me, on this argument, to attempt to deal with the mass of these criminations, for most of such questions can only be fairly adjudged on the final hearing. At present, it is sufficient to inquire whether the defendant has made it clear, that if he shall be permitted to collect the moneys of the firm, they will be safe in his hands, and that they will be appropriated as equity requires. In the view which take of this question, whether regarded as a matter of fact. or with reference to the rules of law which bear upon it, but a very few of the particulars so elaborately discussed by counsel are involved, necessarily, in its consideration. These circumstances which have led me to a result, I will state. with all the brevity which is consistent with the clear indication of the facts and legal principles on which my decisio

It is admitted that the partnership has been dissolved by

Randall v. Morrell et al.

al consent, and, as a necessary result, its concerns are adjusted and finally settled under the control of this It has become, therefore, the province of this tribunal that the assets are properly preserved and distributed; this is a duty which it owes, not only to the members e co-partnership, but to creditors who are peculiarly ts of its care and protection. In addition to this, I rd, as at present advised, the defendant as insolvent. , as it seems to me, is the only reasonable conclusion h can be drawn from the proofs. The fact of insolvency plicitly charged in the bill, and the answer of the deant on this point, if not evasive, is at least ambiguous, in the highest sense, unsatisfactory. This answer is hed in the following terms, viz. "And this defendant es that he was unable to put any capital into the said ness, or that he was insolvent when the said co-partnerwas formed, or at any time after the formation of the nership, or was at any time unable to pay his debts, ss the advances which he has made to the said firms of rell and Randall, and Randall and Morrell, shall have e him so." Now, I think it is obvious that, for all tical purposes, this language must be held to import an ission that the defendant is insolvent at the present He declares he was not insolvent at the time of the ption of the partnership, which was in the year 1855, he then avers that since that date he has not been so, 88 his advances to the firm have reduced him to that ition. The advances, thus alluded to, exceeding in unt \$20,000, are matters in dispute in this cause. plainant denies, in toto, the fact of their having been e. In order, therefore, to assume the present solvency e defendant, I am called upon, at this juncture, to decide important fact in his favor. I cannot but conceive that ould be highly improper and hazardous to do this. not willing, by adopting so ill founded a conclusion, to ardize the interests of the complainant and those of itors. I am constrained, therefore, to regard the fact of

Randall v. Morrell et al.

the present inability of the defendant to pay his debts, as established.

If my conclusions against the case of the defendant rested here, I should be inclined to the opinion that the injunction ought not to be dissolved. In this state of affairs, according to my understanding of the rules of a court of equity, & clear case is made for the appointment of a receiver. In the courts of New York, and elsewhere, it has been adopted as an established rule, that on a bill for closing the affairs of a partnership, when it is admitted that the firm has been dissolved, the appointment of a receiver follows as a matter of course. Law v. Ford, 2 Paige 310; Marten v. Van Schaiek, 4 Paige 479.

It is true that this course of decision has not been followed with exact conformity in this state, but the principle has been adopted, subject to the important qualification, the even after a dissolution, a receiver will be appointed on 13 when it appears necessary to protect the interests of the The rule in this restricted, and, as it seems to me highly reasonable form, will be found propounded and elucation

dated in the cases of Renton v. Chaplain, 1 Stockt. 62 Birdsall v. Colie, 2 Stockt. 63; Cox v. Peters, 2 Beas. 41.

But that the circumstance of the insolvency of one of the partners, in addition to the fact of the dissolution of the firm, would, under ordinary circumstances, induce this court to assume the administration of the partnership affairs, I think admits of no doubt. And it seems equally clear, that when the court proceeds on this consideration, an injunction is an almost indispensable auxiliary to a receiver. security of the assets, if left under the power of an insolvent member of a dissolved firm, is the motive, in such case, upon which the judicial action is based; and it applies, with equal force, to the allowance of an injunction as to the appointment of a receiver. It is only by the united efficacy of these two safe-guards that, when insolvency supervenes, the assets of the co-partnership can be secured and preserved for the benefit of those to whom they equitably belong.

1

3.

Randall v. Morrell et al.

I think, therefore, the conjoint effect of the admitted dissolution of this partnership, and the insolvency of the defendant, would fully justify me, acting on the ordinary principles of this court, in advising the continuance of the injunction; but I do not rest my decision entirely on that ground. There is another circumstance, which, to my mind, is decisive.

The bill charges that the defendant, in his accounts, and in the books of the company, has credited himself with advances, in the form of capital, to an amount exceeding \$20,000; and it further charges that this money has not, nor has any part of it, been so advanced, and that such entries are false and fraudulent. It also interrogates upon this subject, and calls for a particular statement of the times when such pretended advances were made, in what amounts, and whence such moneys were derived. These questions have not been fairly answered. The whole subject has been Et in the utmost obscurity by the defendant. The inquiry uched his character for honesty, and yet he has not met it, only it could properly be met, by a complete elucidation. e says he put in this capital, in two sums of about ten thouand dollars each, and the residue on another occasion. esignates no dates, though expressly required to do so. Links he must have put in, in all, about thirty thousand dollars, but he claims a much less sum. He says the books were originally kept in so loose a way that they do not show, n any intelligible form, these alleged contributions to the capital, although such books were almost exclusively under his own supervision. Nor does he attempt to explain how such large sums could be carried into the affairs recorded in the books, without leaving any appreciable indications of their receipt. Finally, although interrogated on the point, he makes no disclosure of the sources whence these moneys Under these circumstances, I consider this were derived. claim in the highest degree suspicious. It is clear that the bill, in this important respect, is not answered, and upon

Randall v. Morrell et al.

well established principles, the injunction, for this reason, should be retained.

But in addition to this feature of the case, it further appears that the firm has claims to a very large amount against the government of the United States, for property appropriated, during the war, to the public use. these claims has already been adjusted, and admitted to be due by the public authorities, and if this injunction should be dissolved, this large sum of money will pass immediately into the hands of the defendant. If he should obtain the control of this fund, he would, undoubtedly, consider a large portion of it to belong to himself, on account of his alleged contributions to the capital. Entertaining this notion of his rights, he would probably apply such moneys to his own individual uses. To permit this to take place would be equivalent, so far as the interests of the complainant are concerned, Its practical effect would be the to a dismissal of his bill. same as a decision of the cause, at this stage, in favor of the The plainest considerations of justice require defendant. that the funds in question should not be allowed to pass into the possession of the defendant, until his right to them shall have been established by a final decree. The points of argui, ment antagonistic to the foregoing view, urged by the counzel of the defendant, have received due consideration. principal position taken was, that after the complainant Izzad knowledge of the alleged fraudulent entries in the books the defendant, in his own favor, he executed a power of torney to him, authorizing him to enforce the claims agai 🕶 🖹 But, under & Fra the government, and to collect the assets. circumstances as they then probably appeared to the co plainant, it does not appear that his conduct was at varia 📭 🧢 with a belief, on his part, in the dishonesty of the defenda 22 t It is clear that he then regarded the firm as hopelessly i His whole time was absorbed in affairs of grest All h is magnitude connected with his individual business. knowledge concerning the claims against the government appears to have been derived from the defendant, and be

Sayre v. Sayre.

I scarcely feel assured of their authenticity. In fact, he is to have been in a position where he had but a choice een an alternative of evils; that is, to suffer the claims not the United States to lie unenforced, or to trust their ecution to the defendant. I think it is fair to infer, that unfided in the defendant from the compulsion of circumces. I do not think this forced confidence purges the identification the suspicion which attaches to his conduct is particular referred to.

y conclusion is, that the present motion should be denied, s the complainant has not exhibited proper diligence in prosecution of his suit, I shall advise his honor, the cellor, to make that order, without costs.

Brooks Sayre vs. ISAAC SAYRE.

Where the subject matter of the trust is in controversy, all the trusust be made parties.

he mere fact that the title to trust property is deposited in trustees, of deprive the grantor of his control over it, if his rights are not limr in some way qualified, by the deed.

r. Ranney, for complainant.

r. A. O. Zabriskie, for defendant.

:ASLEY, C. J., sitting as Master.

is bill, which is in the ordinary form, seeks the forere of a mortgage. Isaac Sayre, who is the mortgagor,
the sole defendant, by way of plea, sets up the following
as a defence, viz. that after the execution of the bond
mortgage in question, the complainant, by his deed,
in consideration of one dollar and other lawful considons, "and to the end that the estate of the said Brooks
e might be taken care of and husbanded, so as to prevent
waste and destruction thereof," sold and conveyed all
OL. II. 20

Sayre v. Sayre.

his estate, both real and personal, to the defendant and one Brooks Sayre, jun., and the survivor of them, in trust for the use and benefit of the said complainant, for and during his natural life, and at his death "the said indenture to be void, and the estate, real and personal, to revert to the heirs of the said" complainant. The plea further alleges, that by the same deed, the complainant constituted the defendant and the said Brooks Sayre, jun., his attorneys, "to take the same charge and management of all his business affairs, as he, the said Brooks Sayre, could lawfully do, if acting therein." There was also an averment that the bond and mortgage were a part of the estate of the complainant which was embraced in this conveyance.

I think this plea should be sustained. From the averments which it contains, it appears that the suit is defective for want of a necessary party. Brooks Sayre, jun., has a interest in the moneys in question, which cannot be divested by a decree in his absence.

The substantial case is this. The bond and mortgage the defendant, given to, and held by the complainant, were transferred by him, upon certain trusts, to the defendar and to Brooks Sayre, jun. It is not pretended that, by th act, the debt was extinguished by way of merger or othe wise; but it is admitted that the title to the bond and mor gage was transferred to the two trustees, and that it now r On the part of the defendant, it is insistesides in them. that by the creation of this trust, the complainant lost a control over these moneys, and that they must devolve a cording to the limitations of the settlement. This positiois controverted by the complainant. Now, it is obvious, the is a question in which both trustees are interested, and upo which they have a right to be heard. The suit, therefor is defective from the omission of Brooks Savre, jun., as party, and on this account the plea must be sustained.

To avoid misconstruction, it is proper that I should sathat no opinion is intended to be intimated on the merit of the case. Whether the deed of trust described in the please.

Jones v. Jones.

while it transfers the legal title of the property, both real and personal, to the trustees, does not leave the entire equitable interest, including the jus disponendi, in the complainant, is a question which, it seems to me, may admit of serious argument. If the rights of the settler over the trust estate are not limited, or in some way qualified in the deed, the mere fact that the title to such property is deposited in the trustees, will not deprive him of his control over it. Under such a disposition, he would undoubtedly have full authority to dispose of it at his pleasure, and consequently in a suit in this court, he could call it out of the hands of the trustees. In this aspect, it would present the case of a simple trust; that is, a naked investiture of the title in the trustees for the benefit of the settler. There does not appear to be any express limitation on the right of the complainant, as the equitable owner, contained in the deed, and if such right is restricted, it must be by force of implications, to be raised up by construction. But as this point was not discussed before me, and as its consideration would seem to be inopportune, in the absence of a party who is interested, I shall refrain from all expression of opinion on the subject.

On the ground first above laid down, I shall advise his honor, the Chancellor, to sustain the plea, with costs, giving to the complainant the privilege to amend his bill, if he shall be so advised.

ALICE L. JONES vs. THEODORE F. JONES.

Upon a bill for divorce on the ground of adultery, the confessions of the defendant, made under circumstances which exclude all suspicion of an attempt to fabricate evidence, and of any collusion between the parties to the suit, and sustained by facts irreconcilable with his innocence, will entitle the complainant to a decree.

Jones v. Jones.

Mr. J. P. Jackson, for complainant.

Beasley, C. J., sitting as Master.

The case laid in the bill is established, to my satisfaction, by the evidence. It is true that the fact of adultery is main ly proved by the confession of the defendant, which is a piece of testimony open to much suspicion in a case of this character. Indeed, the approved rule of law appears to be, the advorce will not be granted, when the admissions of the criminal party constitute the entire basis upon which to rest the conclusion of guilt. Such evidence, it is said, may convince to a moral certainty, but it does not fill the measure of legal proof. That such a standard for legal judgment could not safely be adopted, is apparent, when we consider the ease with which the entire case could be simulated by colluding parties. The precedents, therefore, wisely require something more than the naked declarations of the defendant.

In this case such additional proof has been supplied. It is shown that the defendant, after his marriage, visited houses of ill-fame, on occasions and under circumstances entirely irreconcilable with any purpose but a vicious one, and there is strong reason to believe that he contracted a disease, the existence of which would afford plenary evidence of his guilt. Added to these circumstances, his confessions were made at various times, to different persons, and in a manner which excludes the least suspicion of an attempt to fabricate evidence, and of any collusion between the parties to the suit.

I hold the prayer of the complainant should be granted, and shall advise his honor, the Chancellor, accordingly.

Brown v. Elliott.

BARTHOLOMEW BROWN vs. ADAM ELLIOTT,

juity will interfere to restore rights which have been lost by unavoid-accident.

Ir. Titsworth, for complainant.

Ifr. Ranney, for defendant.

BEASLEY, C. J., sitting as Master.

I judgment was obtained in the court for the trial of all causes, by one Eagan, against the complainant, which afterwards docketed in the Common Pleas of the county Essex. By virtue of an execution, issued on this judgat, the interest of the complainant in a certain house and such interest being an undivided moiety, was sold at iff's sale, and was purchased by the defendant. It is to d this sale that this bill was filed.

he facts were these. Eagan sued the complainant before stice, in Newark. To this suit the complainant, with counsel, appeared, and the result was a non-suit. following day, another summons was served, and the plainant charges in his bill, and has verified the same on his examination as a witness, that he took this secsummons to the office of his counsel, and not finding at home, left it with his clerk, who promised him that business would be properly attended to. He further 3, that his counsel had before this assured him that the ntiff could not recover against him, and that, confiding his representation, and in the belief that the suit would looked after, he returned to his home, which was in Elizahport. That he heard nothing more of these proceedings, il he ascertained that his property had been sold for a ed of its value, under the judgment docketed in the pleas; t upon this discovery he tendered the purchase money interest to the defendant, who refused to accept it.

Brown v. Elliott.

The bill further charges that the reason why the suit was not defended was that his counsel was taken sick, and in that way the business was neglected.

Upon this state of facts, it is clear the complainant would be entitled to relief in this court. The foundation of his equity is accident. His rights have been lost by no negligence or misconduct on his part, but simply by the unavoidable occurrence of the illness of his counsel. It is not necessary to vouch authorities on this point. The only possible question which can arise, is whether this equity has been rebutted.

It is important to observe, that the fact of the prevention of the attendance of the complainant's counsel, by sickness, on the trial before the justice, is not denied in the answer. This essential allegation, constituting the gravamen of the bill, has been passed by in the answer, in silence. The defendant has not even negatived his own belief in its truth. The complainant, as a witness, again attested its reality, and consequently it must be received by me as proved.

It is true that the defendant set forth in his answer that he did not believe that the complainant had been surprised, because the docket of the justice showed that on the return day of the second summons the complainant appeared and obtained an adjournment. The justice was examined as witness, and testified that this was the case, and that on the occasion specified, the complainant and his counsel did appear, and that the suit was adjourned at their request.

The complainant is under a different impression. But do not think the circumstance of much consequence. The complainant, who is evidently an ignorant man, unskilled in the course of legal proceedings, may have appeared at the time referred to, and subsequently confided the case to his counsel. I see not the least reason to call in question the fundamental fact, that the suit was left with the counsel to be taken in charge, either on the return day of the summons, or at the day of trial.

Having come to the conclusion that the property of the

Brown v. Elliott.

plainant has been sacrificed in consequence of the ab-, at the time of the trial before the justice, of his asel, and that such absence was the result of accident, was not imputable to the negligence of the complainant, of any other person, I think the complainant is entitled he relief prayed for in his bill.

'he terms upon which this relief should be granted have usioned me some perplexity.

The defendant must be re-imbursed the purchase money, also ten dollars spent by him in improvements. But ler the circumstances, I do not think he is entitled to is. He did not act with fairness.

tappears from the evidence, that it was the practice of sheriff, in case the defendant in execution was absent, was a resident of this state, to make an adjournment in favor. Both the sheriff and his deputy testify that the ndant gave them to understand that the complainant a non-resident, and one of them understood him to say, n inducement to proceed with the sale without delay, the property would be purchased for the complainant's

There are other circumstances which tend to confirm indication of misconduct against the defendant.

shall advise his honor, the Chancellor, to order a reconnce of the premises in question, on the terms above ified, but without costs on either side.

does not seem to me that a reference to a master is neces-, as the sums to be required are all fixed by the proofs.

FREDERICK S. THOMAS vs. LEMUEL THOMAS and WILLIAM H. STANFORD.

- 1. When a decedent leaves a debt due by specialty, and the residuary fund has been exhausted, there being neither lands descended, nor lands charged with debts, the general rule is, that the specific legacies and thelaza d devised must contribute ratably to discharge such debt.
- 2. But in case the decedent has secured such debt by way of mortge. on any part of the land devised, after the exhaustion of the general r siduary fund, the devisee of the mortgaged land cannot call for contribution either on the general or specific legatees.
- 3. A right given by will to occupy, at a specified rent, certain premise es as long as the devisee may desire to occupy the same as a drug store amounts to an estate for life.
- 4. Such tenant is bound to keep down the interest of the encumbran on the property, but he cannot be compelled, as between himself and - Ite remainder man, to pay off any part of the principal.

Mr. A. P. Condit, for complainant,

Mr. W. S. Whitehead, for Lemuel Thomas.

Mr. T. Runyon, for William H. Stanford,

Beasley, C. J., sitting as Master.

The only controversy in this case is that which has arise. between the defendants, and it is one in which the complair ant has no interest. It appears upon the answers whic 1 have been filed, and, although it is thus presented in a for z somewhat irregular, an opinion will be expressed on the points which have been argued, as by this course the necessary

sity of further litigation may be avoided. The object of the suit is to foreclose a mortgage.

Luth == 1 S. Thomas, who was the mortgagor, by his will, devised the mortgaged premises to the defendant, Lemuel Thomas, - 1 condition that he would permit the other defendant, Willia H. Stanford, to carry on the business of a druggist, in a ce

part of the premises then occupied by him, so long as night desire to use it for that purpose, at an annual rent, to exceed one hundred dollars, it being expressly proed, that this privilege should be personal, and should not end to his representatives or assigns. The testator then ueathed to Mr. Stanford, the stock and fixtures in the g store above mentioned, and also all money standing to credit in the Mechanics Bank at Newark, on condition the should pay all the testator's debts, for which he was le on account of said stock in the business of said store. subsequent clauses, divers specific legacies are given to ious persons, and the residue of the estate, to one of the thers of the testator.

The questions discussed before me, relate to the proper de of marshaling the assets of the estate according to litable rules, in view of these testamentary dispositions. t was insisted by the counsel of Lemuel Thomas, who is devisee of the fee in the mortgaged premises, that the duary estate, in the first place, must be applied in payment he mortgage debt; and that, as that will not be sufficient, specific legatees must contribute, pro rata, with the tgaged property, to discharge the residue of such debt. argument urged in support of this position was, that the 1 and mortgage in question had been given by the tesr himself, and that, consequently, this represented a debt from him by specialty; and that it was the well settled , that in such cases, upon the exhaustion of the residuary l, and the pecuniary legacies, the specific legacies and the devised, when there is neither land charged with debts, land descended, must bear the burden in the ratio of r respective values. In support of this proposition variauthorities were cited, which fully sustain it. but the rule thus contended for and established, does not

ly in the present instance. There is a circumstance in case which did not exist in those recorded in the authors referred to. They belonged to the class of cases in which debt secured by specialty, had not been imposed by the

testator himself, on any part of his estate, and under such conditions, undoubtedly, the rule above propounded obtain. But where there is a specific lien on the real estate devise as in the case now before me, a different principle of distribution is introduced. If this debt of the testator existed in the shape of a bond, it would have been no lien on any part of the estate; but if the holder of such specialty had proceeded to enforce his claim, after the exhaustion of the personassets, which would, of course, be the primary fund, and have proceeded to raise the residue out of the real estate, in such case, a clear right in equity would have supervened in the devisee, to call upon the specific legatees for a ratable contribution.

In such an attitude of rival interests, according to t

established gradation of liability, the appropriation would be first, the residuary fund; next, general pecuniary legacies; and then, pari passu, specific legacies and devised lands. The is was the order of contribution recognized and acted upon i in the case of Shreve v. Shreve, decided in the Court of Appear of this state, in the Term of June, 1864. But the distinction is between the mere general right of the holder of a specialty debt to levy it at his pleasure on the real or personal estation, and the lien growing out of such debt, imposed by the testato in himself upon the land. In such event, the doctrine has been long established that, after the application of the general residue of the estate, the land thus encumbered must solely bear the burden. By force of such a testamentary disposition, the devisee of the encumbered land cannot disappoin

The early decisions in which this rule is propounded an applied, are those of Lutkins v. Leigh, cases tempore Tabot 53, and Forrester v. Leigh, Ambler 171. And in modern times, the rule has often been received as of unquestionable obligation, both by text writers and in judicial opinions. 2 Roper on Leg. 957; 2 Williams on Ex'rs 1453; 2 Jarman on Wills 428, and the cases cited.

either the specific or general legatees.

In the case in hand therefore, in my opinion, that part of

the estate of the testator which is comprehended in the residuary clause of the will, must be first taken and applied to the payment of the debts, including the claim of the complainant, and the residue of such claim must be paid out of the mortgaged property. For the payment of this debt, the specific legatees cannot be called upon to contribute.

The counsel of the defendant, Lemuel Thomas, further insisted, on the argument, that the interest of Mr. Stanford in the mortgaged land must be held liable, proportionably, for Payment of the complainant's demand.

There appears to be no room for doubt on this point. The will gives this defendant the right to enjoy a part of the mortgaged property, paying a rent the maximum of which is designated, as long as he may desire to use it as a drug store. This gives Mr. Stanford a freehold interest in the Premises; his estate is deemed, in law, one for life. 1 Washb. Real Prop. 88. One of the incidents of such an estate s, that the tenant must keep down the interest of the enmbrances on the property enjoyed by him, but he is not orced, as between himself and the reversioner or remainderan, to pay off the principal of any moneys charged upon it. And it is also equally clear, that if he is obliged to take up, his estate is taken to pay off, the principal of such an en-Cumbrance, he will become a creditor of the estate for the mount so paid, deducting the value of the interest he would have to pay during his life. See the rule as stated by Judge Story, 1 Eq. Jur., § 487.

But this and the other question discussed are aside from the purpose of this suit. The proper parties are not before the court to authorize the marshaling of the assets.

The only decree, therefore, which can be rendered, is the ordinary one for the foreclosure and sale of the mortgaged property; and I shall consequently advise the Chancellor to make that decree.

GEORGE L. WHITNEY and others vs. Louis S. Robbins and others.

- 1. The jurisdiction of the Court of Chancery to collect the choses in action of a judgment debtor, and apply them to the payment of his debts, has never been assumed in this state, until conferred by the acts of March 20th, 1845, (Pamph. Laws 141), and April 12th, 1864, (Pamph. Laws 704)
- 2. A suit brought by a creditor, under these acts, must be brought for himself alone, and not for himself and such other creditors as may join therein. The relief given is for the creditor who pursues the statute; no others are entitled to share with him the benefits of the proceeding un til
- he is satisfied.

 3. To a bill filed for discovery and relief, under the above mention of acts, all persons through whom the title of the property charged to be held in trust had passed, and who knew, therefore, the truth of the facts to inquired into, are proper parties. Such bill is not liable to the objection of multifariousness, on the ground that other facts may be inquired in the with which they have no concern, and that the receiver may receive other property than that in which they were interested.
- 4. The appointment of a receiver, under said acts, must depend upon t fact whether any chose in action or property held in trust for the debteman has been discovered by the answers, examination, or evidence.
- 5. That an answer is insufficient in some particulars, does not destroy feffect upon the points upon which it answers directly. And where the complainant has accepted it, he is bound by it.

The bill of complaint sets forth that the complainant. Whitney, on the 8th of March, 1864, issued an attachment out of Hudson county Circuit Court, by which two lots on South Third street, in Jersey City, were duly attached a street the property of Louis S. Robbins, the defendant therein That the complainants, West and Caldwell, were admitted a creditors in said attachment. That Robbins appeared an dissolved the attachment; and that on the 20th day of February, 1865, judgments were obtained against him by Whiney for \$971.86, and by Caldwell and West for \$1078.6—10, besides costs. That writs of fieri facias were issued on said judgments, and returned by the sheriff unsatisfied, with the said strength of the sheriff unsatisfied, with the said strength of the sheriff unsatisfied, with the said strength of the said strength of the sheriff unsatisfied, with the said strength of the s

further return, that he could find no goods and chattels, or lands; whereon to levy.

The bill further states, that in 1864, Louis S. Robbins placed in the hands of Matthew P. Robbins a large amount of money, to be invested for him, in the name of Matthew, for the purpose of protecting the same from the creditors of Louis, who was largely in debt. That, with said money, M. P. Robbins purchased said two lots, and took the deed in his own name, but in trust for said L. S. Robbins. on the first of February, 1864, M. P. Robbins, at the request of L. S. Robbins, for the avowed purpose of enabling him better to elude his creditors, conveyed said lots to Clara Augusta Robbins, the wife of Louis; intending that she should convey them to his brother-in-law, the defendant, W. W. That, on the 9th of February, 1863, L. S. Robbins and his wife conveyed the same to Keith, without consideration, by and for the nominal consideration of one dollar, intending the same to be held in trust for L. S. Robbins. That Keith, on the first of October, 1864, conveyed said lots to defendant, Minthorn, for the nominal consideration of That said conveyance to Keith and Minthorn were both without any consideration paid, and intended in trust 10r L. S. Robbins, who procured the same to be made to defraud his creditors.

The bill prays a discovery and order for the examination of L. S. Robbins before a master to make discovery of his things in action, for a receiver, and for a conveyance by L. S. Robbins and his assigns; also, that the conveyances to Keith and Minthorn be set aside, and that the property and things in action of L. S. Robbins be appropriated to the payment of the complainants' two judgments.

An order was made for the examination of L. S. Robbins, which was had; several other witnesses were examined, including M. P. Robbins.

The defendants, L. S. Robbins and wife, Keith, and Minthorn appeared, and except Minthorn, against whom a decree pro confesso was taken, answered. They deny that the

Vol. II. 2

lots were purchased with L. S. Robbins' money, or for his use, or with his knowledge or consent. They admit that they were conveyed to his wife for a consideration paid by him, and that they were conveyed by her to Keith, as stated in the bill, but for a consideration of \$1700, which was paid by Keith to Robbins, by crediting that sum in an account actually owing by Robbins to Keith; that they were conveyed by Keith to Minthorn, as stated in the bill, for the consideration of \$4200, expressed in the deed, of which \$2800 was paid in cash by Minthorn to Keith, and \$1400 by assuming an old mortgage to that amount on the lots, and that the cash was used by Keith in his business. They disclaim all interest in the premises, and deny that they are, or were, held by Keith or Minthorn, in any way, in trust for L. S. Robbins.

A replication was filed, and after issue joined, testimony was taken in addition to the depositions under the order for examination, which were also used on the hearing; the parties having, pursuant to the statute, filed notices of their intention so to use them.

The testimony, as to the fact whether the lots were orimally purchased for L. S. Robbins, and with his money, or withis assent, was conflicting and directly contradictory; the of L. S. Robbins, on the one side, and M. P. Robbins, on the other, being respectively supported by other witnesses, documents, and corroborating facts.

But there was no direct evidence, on either side, whethere the conveyances to Keith and Minthorn were without comsideration, except the examinations of L. S. Robbins.

The cause was argued before A. O. Zabriskie, esq., mastesitting for the Chancellor.

Mr. J. Weart, for complainants.

Mr. Ransom, for defendants.

THE MASTER. The bill in this case is founded on the act of March 20th, 1845, (Nix. Dig. 106, § 81,) and the supplement of April 12th, 1864, (Pamph. Laws 704.) acts were intended to enable judgment creditors to reach things in action, debts due to the defendant, and property held in trust for him, which could not be levied on and sold by execution at common law, or by the statutes then in The "act to prevent fraudulent trusts and assignments," approved March 7th, 1850, Nix. Dig. 271, gave in the courts of law, a like remedy as was designed to be given by these acts through the more efficacious and suitable nachinery of this court. Money, bank notes, and shares in Orporations, had necessarily been made liable to execution y statute; but other rights in action or property, held in rust for the defendant, could not be levied on or sold. England, the 10th section of the Statute of Frauds, 29 Tharles 2, ch. 3, had, by express terms, made trust estates iable to levy, on executions against the cestui que trust, and he Court of Chancery gave its aid to remove impediments and to secure the trust property to the execution creditor. But when the English statutes were abrogated, the provisions of this section were not incorporated into the state statutes, and trust estates were no longer liable to seizure and sale on execution. And, although in New York, and to a certain extent in England, attempts were made to establish the jurisdiction of the Court of Chancery to collect the choses in action of a judgment debtor, and apply them to the payment of his debts, it was a new branch of equity jurisdiction, not established before the Revolution, and in New Jersey has never been assumed by this court, until conferred by the statutes above mentioned.

The suit, in this case, is rightly brought by the complainants for themselves alone, and not for themselves and such other creditors as may join therein. The relief given is for the creditor who pursues the statute; no others, either creditors at large or judgment creditors, are entitled to share with him the benefits of the proceeding, until he is satisfied.

And the objection taken on this ground in the answer, by way of demurrer, and upon the argument, cannot prevail.

The objection taken in like manner on the ground of multifariousness, cannot defeat the complainants. All the defendants are rightly joined in this bill, for the discovery and the relief authorized by the statutes. They are the persons through whom the title of the property, charged to be held in trust, had passed, and who knew the truth as to the facts That other facts, in which they have no coninquired into. cern, may be inquired into, and that the receiver appointed may receive other property than that in which they were interested, does not make this bill multifarious, for, by the acts, it must be to discover all the defendant's property and things in action, by whomsoever held. The prayer, that the deeds to some of the defendants be declared void, and they be compelled to convey to a receiver, is a prayer for relief that cannot be had in this suit, and as these defendants are proper parties for the discovery, an improper prayer cannot make the bill liable to the objection of multifariousness.

Whether the original purchase of these lots by M. P. Robbins was for himself, or in trust for L. S. Robbins, is a fact difficult to determine, from the conflicting and contradictory testimony. But as this case is presented, the determination of that point is not necessary to decide it.

The relief provided for by these acts is, the discovery of property, preventing its payment to the defendant or transfer to a stranger, having a receiver to collect and sell it, to whom the court can compel the defendant to convey it, and the application of it to pay the debt of the complainant.

The appointment of a receiver must depend upon the fact whether any chose in action or property, held in trust for the debtor, has been discovered by the answers, examination, or evidence. This is clearly the intention of the act.

In this case, the only property that the complainants claim to have discovered, is the two lots in Jersey City. Now, to entitle the complainants to a receiver, it must appear that they are now, or were, at the filing of the bill, held

in trust for Louis S. Robbins. That they were once held in trust for him will not suffice,

Now, if we take for granted the allegation of the complainants, and the proof of their witnesses, that these lots were purchased and held by M. P. Robbins, in trust for L. S. Robbins, and that after the conveyance to his wife, they were held by her in trust for him; when we come to the next step, which is the conveyance to Keith, there is no proof that this was without consideration, or in trust for L. S. Robbins. He and his wife and Keith have all answered. On this point their answers are responsive to the bill, and on matters within their personal knowledge. They swear that the conveyance was in good faith, and for a valuable and adequate consideration, paid by allowing a credit to that amount on an account due from Robbins to Keith. If this be true, the consideration is as good and sufficient as if paid in cash. The legal title, on the showing of the complainants, was in Clara, as trustee for her husband, L. S. Robbins. The trustee and cestui que trust join in a conveyance for a valuable consideration, and with full covenants of warranty; this conveys the property free from the trust.

That the answers of Robbins and Keith are insufficient in some particulars, does not destroy their effect upon the points upon which they answer directly. Few answers are full and perfect. The complainants could except and compel full answers; they have accepted these answers as they are, and are bound by them.

If there had been conflicting testimony on the fact of the consideration, the omission to answer fully would have impaired the weight of the answer as against the testimony.

These answers are supported by the testimony of L. S. Robbins, and are directly contradicted by no one. The circumstances of suspicion proved, though entitled to consideration, are not sufficient to overcome these positive answers and this testimony, especially on a point that the complainants are bound to prove affirmatively, to entitle them to relief.

The same considerations will apply to the conveyance to

Minthorn. Keith answers positively that the consideration of \$2800 was paid in cash, and that he used it in his business. This answer may be false. There are circumstances that throw suspicion upon it. That Minthorn, the only party who seems to have an interest, has not answered, is a strong circumstance, but will not supply the want of evidence, though in might weigh much in a conflict of testimony. That the bil is taken as confessed against him cannot aid. No relief to be had against him in this suit; it is only for a receiver against L. S. Robbins. Minthorn is called upon for a discovery to found that relief upon.

Before the Chancellor can give relief in this proceedin it must appear by proof that some person owes the defendant otherwise than for personal services, or holds proper in trust for him not proceeding from a stranger. In the case there is no sufficient proof of this. There are circumstances that raise suspicion, strong suspicion, that there something wrong in the conduct of L. S. Robbins, in regalite to this property, but they fall short of convincing me the property is now held in trust for him.

I therefore feel constrained to advise the Chancellor dismiss the complainants, but that such dismissal be without costs.

EORGE CRAMER and EDWARD PIERSON vs. JAMES A. REFORD and Ann, his wife.

GEORGE S. CORWIN vs. SAME DEFENDANTS.

HN F. VOORHEES vs. JAMES A. REFORD and wife, and others.*

HN C. DOREMUS vs. JAMES A. REFORD and wife, and others.

The wife's earnings, and the avails of her labor, during coverture, g to her husband, and he cannot, as against his creditors, give, or to give, them to her.

Real estate purchased with the wife's earnings, during coverture, g to the husband, and is subject to be taken for his debts.

A conveyance, in view of future indebtedness, and with an intent to

the property beyond the reach of creditors, is fraudulent, as against ors, and will be set aside.

ors, and will be set aside.

A husband cannot testify in favor of his wife in a civil suit in which a party.

nese cases were argued together, by consent, before J. on, esq., sitting for the Chancellor.

r. H. C. Pitney, for all complainants.

ere Reford and wife competent witnesses?

The legal title is in Mrs. Reford. The bill is filed to I her title. Her husband cannot be sworn as a witness er. Bird v. Davis, 1 McCarter 467.

Mr. Reford was not a mere formal party. He is the or, and the allegation is that the property is his, and must be a decree against him.

ie same principle that excludes the husband from swearor the wife, excludes the wife from swearing for the and.

^{* 1} McCarter 155.

The complainants, though sworn, confined their testimony to matters strictly within § 27, Nix. Dig. 928.

Again, the husband being incompetent, the complainants were incompetent, and the complainants being incompetent, it follows that the wife is also incompetent. Nix. Dig. 928, § 34.

It follows that neither the deposition of Mr. or Mrs. Reford should be read.

I shall consider the case as if both depositions were read.

As to the merits. Complainants ask conveyances to be set

aside as fraudulent, and the land in question subjected the lien of their judgments and sold to pay them, on three grounds.

First. The debt upon which Corwin's judgment is founded arose prior to the conveyances.

Second. Reford was indebted, on the 25th of March, 185—
(the date of the deed,) to John Henry Ehlers, in about \$10—1

to the church, for a pew bought, in the sum of \$90; and the Newark City Bank for \$500, on a note made by Jam W. Crane, indorsed by Reford, Ehlers and Simeon Baldwi and which was an accommodation note got up to raise monfor Reford to start business. The execution and delivery the deeds made him insolvent. Before the actual delivery the deeds he became largely indebted to divers other persons.

Third. The deeds were made in contemplation of futu indebtedness, and the case is within the principle of Beerman v. Montgomery, 1 McCarter 106; Belford v. Crane, C. E. Green 265.

I. Corwin's claim consists mainly of a note of \$540, given by Reford to one Kay, for rent of Pocahontas paper mi and which note Corwin indorsed, at Reford's request, and his accommodation, and was obliged to pay. Reford was i solvent. It is so alleged in Corwin's bill, and admitted in t answer, or not denied. Corwin claims that this note standin place of the rent, and that the judgment upon it is to considered here in equity, and for the purpose of this series if it had been recovered upon the lease itself, and that the

debt represented by that judgment originated when the contract to rent was entered into.

This position rests upon the familiar principle of *subrogation* or *substitution*, which obtains where a surety pays a debt for his *principal*.

Corwin was surety for the rent, and his position in this suit is the same as would be that of Kay, the lessor, if he had recovered judgment on the lease. Dias v. Bouchard, 3 Edw. Ch. R. 485. In that case the complainants had paid government duties for a party who failed and made an assignment, and filed their bill in equity against the assignee, claiming to stand in place of the United States, and have priority of payment of their debt, and it was so allowed. See also Eddy v. Travers, 6 Paige 521.

In Lidderdale's Ex'rs v. Robinson's Ex'r, 12 Wheat. 594, it was held that under the statute of Virginia, giving to debts due upon protested bills of exchange the rank of judgment debts, a joint indorser who has paid more than his share of the debt, has a right to satisfaction out of the assets of his co-indorser, with the priority of a judgment debtor. See reasoning of Johnson, J., page 596.

I cite also Burrows et al. v. Carnes' Adm'rs, 1 Desaus. 409, which was a case of payment and satisfaction of record of a judgment against a surety, and the judgment was revived; also Ex'rs of Wayles v. Randolph, 2 Call 125, a case of payment of a bond by a surety, without assignment, and bill by him claiming standing of a specialty creditor, and so held.

The English cases do not go quite so far in this direction as the American cases, but the practical result is the same. The case of Copis v. Middleton, 1 Turner & Russell 224, is cited by Story as restraining the rule. But he admits the American cases are mainly the other way. 1 Story's Eq. Jur., § 493, note; § 499 b, and note, where Justice Story says Copis v. Middleton is not followed in America; § 499 c; § 500, 501, 502; Robinson v. Wilson, 2 Madd. 569.

In this case now before the court, the debt is the same;

its form only is changed. It is not a question of specialty, or simple contract, or judgment; not a question of character, but of origin.

When did the debt for which Reford gave the note in question arise? Clearly, when he entered into the contract to lease the paper mill. The obligation he then entered into, has never been discharged by him. He cannot claim that he has paid it; as to him, it is unpaid.

Corwin's position in this suit, is precisely the same as if judgment had been recovered upon the lease itself. What then is the date of the origin of this debt? The rent accrued between October 1st, 1858, and April 1st, 1859, but the lease is dated April 1st, 1858, and the covenant to pay this rent was then made. It was "debitum in præsenti, solveradum in futuro."

It is not necessary for the purposes of this case, to go as far as the cases have gone. Man v. Rainsborough, 2 Keble 99; Twyne's case, 3 Coke 82; Jackson v. Myers, 18 Johns. A. 426; Jackson v. Mather, 7 Cowen 301; Jackson v. Seward,

5 Cowen 67; Roberts on Frauds, 455, 459.
The lease is dated April 1st, 1858, and we contend that

is sufficient for our purpose at that date.

The deed to the son, J. Banks Reford, is dated March 25t—1, 1858; certificate of acknowledgment, May 1st, 1858; recorded May 17th, 1858. Mr. McDonald swears that the deed was left in his hands, as an escrow, to be delivered the grantee when his wife should acknowledge it. It was attually delivered May 4th, 1858. That is the first that the so

or anybody for him, had the deed. There was no delive in law, until that day, May 4th, 1858. As to creditors a all the world, there was no transfer until May 17th, 185—8, the day it was lodged for record.

There being no change of possession, the registery of deeds was the only notice the public had of the change of title. If these positions are correct, there is an end of the case.

James A. Reford was in full possession, as absolute own er,

for seven weeks after the date of the lease, and then settled he property on his wife, without consideration. Under the niform rule of equity, in such cases, the settlement must set aside. Reade v. Livingston, 3 Johns. Ch. R. 500;

But we are able to trace the origin of this debt further ck than April 1, 1858, the date of the lease. The concet to enter into the lease was made about February 25th, 1858. Reford answered Kay's letter of February 25th, 1858, then a valid contract was made. Reford says he contered himself bound February 23d, 1858. He was then solvent.

A contract to take a lease is as well known to the law, and equity, as the lease itself. In equity, the title changes then the preliminary contract is made, as well in contracts lease as in contracts to purchase.

On a question of origin or nativity, we go back to the first rement or understanding.

This view of the case takes us entirely back of the consyance in point of time, and makes it conclusively frauduant, as to Corwin's debt; and being set aside as to him, all be other judgment creditors come in, unless Mrs. Reford's beforce puts her in the position of a purchaser for value.

II. Indebtedness, at the date of the settlement, to other parties.

At the date of the deed, Reford owed some \$700, besides he debts incurred in the purchase of stock for the mill.

According to the English practice, these concurrent debts o third parties, are sufficient to set aside the conveyance as o subsequent creditors, provided they are considerable, and he settlement include all, or nearly all, the grantor's property. Lush v. Wilkinson, 5 Vesey 387; Kidney v. Coussmaker, 12 Ibid. 155; Townshend v. Windham, 2 Ibid. 10; Townsend v. Westacott, 2 Beav. 345; S. C., 4 Beav. 58; Richardson v. Smallweed, Jacob 556, 557, and note.

In this case before the court, the settlement covered every

particle of the grantor's property, and left him nothing. He became thereby absolutely insolvent. His insolvent examination shows he had no personal property.

All the cases show that if the grantor was insolvent, subsequent creditors may avoid the settlement. The evidence proves, conclusively, that Reford's circumstances never improved, but that his embarrassments increased until final failure.

Whittington v. Jennings, 6 Simons 493, is direct authority to sustain the bills of Cramer & Co. and Voorhees, upon the strength of Reford's concurrent indebtedness to them.

True, Reford did on one occasion settle with these complainants, and give his notes in payment, but he continued to purchase on credit, and was never out of their debt. In general a mere substitution of a new debt for an old, is payment. Richardson v. Smallweed, Jacob 552; Mills Morris, Hoffman's Ch. R. 420; Botts v. Cozine, Ibid. 86; Sexton v. Wheaton, 8 Wheat. 229, 246.

If any one of these complainants succeeds in establishing this own case, independent of the others, the others complain. 1 Story's Eq., § 355-365, inclusive; Ede v. Knowles, Younge & Coll. 172; Townsend v. Westacott, 2 Beav. 34 Reade v. Livingston, 3 Johns. Ch. R. 500; Cook v. Johnsen Beas. 51; Wickes v. Clarke, 8 Paige 160, 165.

III. But this case may be put upon broader groun. The settlement was made in contemplation of future independences, and to protect the property against the risks business. It is, therefore, actually fraudulent and void, to all creditors.

- 1. It was a settlement of his whole estate, and was not fair and reasonable one. The quantum of the settleme saturates as compared with the total value of the grantor's estate, always taken into consideration. 1 Story's Eq. Jur., § 358, 362; Hinde's Lessee v. Longworth, 11 Wheat. 199.
- 2. Reford remained in possession. The apparent owner-ship was unchanged.

- . It was made directly to his wife, without intervention
- . It was made at a moment when the grantor was just ering into an extensive and hazardous business and untaking.
- 5. Ehler's testimony proves actual fraud. It shows that conveyance was made for the express purpose of putting property beyond the contingencies of future business assactions. His evidence is denied by Reford and wife, but s submitted that he appears, upon the whole case, to be the re reliable witness.
- 3. Reford gained credit on the ownership of this property or the settlement, thereby showing that he had actual adulent intentions in settling it. He meant to gain credit owner, without risking the property.

Chese several badges of fraud must be sufficient to satisfy court that this settlement is tainted with actual fraud, is void as to subsequent creditors.

What is the defense?

- Money consideration passing between father and son.
- L. That the settlement was made in pursuance of a preus agreement that it should be the wife's, because she had ked and helped pay for it.

Chis defense is substantially the same set up and insisted In in Belford v. Crane, 1 C. E. Green 265, and decided rersely to the defendant.

- A distinction may be attempted to be made between that e and the one before the court, because this latter sets up agreement between husband and wife, that the property ould be hers, made concurrently with the original purchase. To which I answer:
- 1. The existence of the alleged agreement rests entirely the evidence of the defendants.
- Their daughter, Grace, was sworn, and says nothing about She lived in the family all the time. The other children so lived at home. Not one is called to prove the agree-Vol. II. 2 I

ment. Ehler's testimony shows that nothing was said about prior agreement, when the deed was decided upon.

- 2. The agreement itself, as alleged and proven, is vague, uncertain, and insufficient to found an equity upon. It is no agreement.
- 3. The amount alleged to have been contributed by the wife is not proven. No account was kept. The evidence does not warrant the belief that she contributed enough to pay for it.

The burthen of proof is on the wife to prove the agreement, and that the money came to her by descent, devise, or gift, and not from her husband. Gamber v. Gamber, 6

- Harris 366.

 4. The property was actually paid for by the husband, with his own earnings.
- 5. The earnings of the wife belong to the husband. Reeves Dom. Rel. 61, 68; Switzer v. Valentine, 4 Duer 96; Fres man v. Orser, 5 Duer 476; Baringer v. Stiver, 13 Am. Law Reg. 559, and cases there cited; Gamber v. Gamber, 6 Harris 366; Raybold v. Raybold, 8 Harris 311; Keeney v. Gamber, 9 Harris 349; Belford v. Crane, 1 C. E. Green 265.

The case before the court is distinguishable from the case of a wife engaging in some special trade, business, and cupation, where her profits and earnings are kept separate, and invested in a stock in trade.

In this case the wife simply attended to her ordinary household duties, kept cows and sold milk, &c., and board ed her own children when they could work and pay board. I tis a simple case of a thrifty housewife claiming compensation services as a wife, to be paid ten-fold against creditors.

This house and lot should be sold, and out of the procecods payment decreed to complainants for the amount due on the eir several judgments.

John C. Doremus has obtained judgment on his notes, and has filed his bill (in the same form as Voorhees' bill) agai 118t all these parties. A decree pro confesso is entered against 21, and the case is set down for hearing ex parte, at this term.

e should be included in the decree, and participate in the lief.

Mr. McDonald, for Reford and wife.

The claims involved in this argument are those of subselent creditors.

The statute of 13 Elizabeth, ch. 5, which the statute of ew Jersey follows, enacts, that conveyances made with tent to defraud creditors, shall be void, with the proviso, cepting such as are made upon good consideration and na fide to any person not having notice or knowledge of ch fraud.

This is supposed to be Mrs. Reford's case. If there was y fraudulent intent on the part of her husband, she was norant of it. As far as she was concerned, there was good asideration and bona fides; and as between her and her 1, there was a valuable consideration, for he paid a debt owed her, by giving to her a deed for this land.

Lord Mansfield, in Cowper 434, assumed that the rules of e common law, as understood in his time, would have tained the same end as to fraudulent conveyances, without e aid of the statute of 13 Elizabeth, and judges since his y, have gone so far as to nullify the proviso, which is a rt of the statute.

But suppose the transaction to have been purely a volunry post-nuptial settlement, made by Reford in behalf of his ife; if the conveyance was not made with fraudulent intent, en it is valid against subsequent creditors. Sexton v. Vheaton, 8 Wheat. 229. In this case, Marshall, C. J., eclares that a conveyance to a wife is fraudulent as against absequent creditors, if made for the benefit of the settler, with a view to being indebted at a future time, and not cause it is voluntary.

So in Beeckman v. Montgomery, 1 McCarter 112, it is said at where the grantor is free from debt, and there are no roumstances showing that the deed was made with a view

to future indebtedness, it can only be avoided by subsequent creditors, upon proof of actual fraud.

Here the grantor was free from debt, as much so as any man can be, for the court in Salmon v. Bennett, 1 Conn-558, say, "if any degree of indebtedness, however small. would defeat such conveyances, they would virtually be, per se, fraudulent, since no individual perhaps, or, at least, hardly any one in the community, is, at any time, absolutely free from debt. Evidence of indebtedness at the time, amounting or approximating to embarrassment, must be shown." It is true that this conveyance included Reford's whole estate, but what of that? As a badge of fraud; it may be explained. In Section v. Wheaton, the court say, "if a man has a right to make a voluntary settlement of a part of his estate, it is difficult to say how much of it he may settle. In the case of Stephens v. Olive, the whole estate appears to have been settled, subject to a mortgage of five hundred pounds, yet

In truth, all the circumstances relied on by the complainants, as badges of traud, indicate no such thing, if we keep constantly in mind the simple fact sworn to in the answers, that the conveyance was only carrying out a long cherished intention of Reford, to settle this very property upon his wife. She had earned it in whole, or in part, as she contended, and wanted the title in her own name. Reford assented, and acknowledged the claim. This may be poor law, in view of the rule that the wife's earnings belong to the husband, but it is anything but fraudulent.

that settlement was sustained."

The property in question was conveyed by Bromley's executors to Conger, (for whom Reford worked,) in 1849, and who held it subject to Reford's order until 1856, when Reford, without taking counsel, demanded and received from Conger a deed for it.

The following fall, a small slip of the land was taken of by the surveyors of the highways for a public road, which irritated Mrs. Reford so much, that she demanded that the title should be vested in her.

Suppose that Bromley's executors, in 1849, instead of conying to Conger, had conveyed to Mrs. Reford, could her le have been put in jeopardy by Reford's taking the Pocantas mills, in 1858, and becoming insolvent then and ere? Certainly not, because the time is too remote and e title never had been in the husband.

But that should make no difference when we come to the estion of intention. The motive that produced the deed, is begotten by the intention to carry out the settlement, d not for the purpose of cheating creditors, or with a view future indebtedness.

THE MASTER. The main point to be determined in these ses is the same, and depends on the same evidence, and ey were, by consent of parties, argued together.

The complainants are judgment creditors of the defendant, mes A. Reford, and executions, issued upon their respective dgments, have been levied upon a certain house and lot of nd, containing about one acre and seventy-five hundredths, nate in Bloomfield township, Essex county, formerly owned fee by Reford, and by him conveyed to his son, Joseph B. eford, who conveyed them to the defendant, Ann, wife of id James A. Reford, and she now holds the same.

It is charged by the complainants, that these conveyances e fraudulent and void as against creditors, because, as it alleged, they were without valuable consideration, and ere made with intent to defraud creditors, and while Reford as in debt, and also with a view to his future indebtedness; id the prayer is, that the deeds may be declared fraudulent id void, and the property sold to pay the judgments.

The answer of Reford and wife denies that the conveyices were made with intent to defraud creditors, and states at they were made upon good and valuable consideration, cause, as it is alleged, it had been agreed between Reford id his wife, that the property should be hers, when he first night it, and that the conveyance to her was in pursuance that agreement, and that she had, during the coverture,

bought cows and poultry, and sold milk and fowls, and received the pay for them; and that she had also boarded her children, who, though they lived at home with their father and made a part of his family, yet worked for other persons and maintained themselves, and that the children had, at different times, made her presents of money, and that it was agreed, between her and her husband, that she should have the money so paid to her in these different ways, in her own right, and appropriate the same to her own use and the support of the family; and that she had expended it in buying furniture and other articles for the family, and also in buying cows, the milk from which she sold as before mentioned; and that without such aid from his children, and the industry of his wife, Reford would have been unable to accumulate the means with which he purchased said house and lot, as his earnings would otherwise have been necessarily expended in the support of his family. The answer admits that, at the time the conveyances were made. Reford was indebted to various persons, but says that those debt = have all since been paid. The answer also admits, that the conveyance from Reford to his son, was mainly for the purpose of having the property conveyed to his wife, but says nevertheless, that Reford was at that time indebted to his some "about sixty dollars," and that the son was also then in deb 🛎 to his mother "for board and washing, the amount where is not now recollected, and also for some twenty-two or three dollars, money advanced to him by his mother, out of here. earnings, for the purpose of purchasing railroad communtion tickets for his own use," and that it was agreed that said conveyances should satisfy and settle such indebtedness-Upon these grounds, it is insisted that said conveyance were made upon good and valuable consideration.

The consideration expressed in the deed from Reford tohis son, and also in the deed from the son to his mother, iz \$1500. But it is admitted that no money, or other thing of value, was, at the time of the conveyance, actually paid or delivered by either party to the other.

The value of the house and lot is, according to the evidence, from \$3000 to \$4000, and by some of the witnesses is placed still higher. Reford says, in his answer, that he wished to buy the property in 1849, but could not do so then for want of means, and also because a judgment for about \$446 was then standing against him and others, his co-defendants, in a suit in the Supreme Court, and that he, therefore, got Mr. Conger, in 1849, to take a deed for it in his own name. Conger continued to hold the property until that judgment was settled, and then, in the year 1856, conveyed the property to Reford, who held it until the spring of 1858, when he conveyed it through his son to his wife.

The conveyance by Reford to his son, must be regarded as only a means used by him to convey the property to his wife, and cannot stand, if the conveyance to her was fraudulent.

Was the conveyance to Mrs. Reford made for a good and valuable consideration? The evidence does not show that she had any property at the time of her marriage, or that she has since acquired any by inheritance, gift, devise, or otherwise, except what she received from the sale of milk and poultry, and from her children for their board, or as presents. It does not appear that she kept any account of the money so received, nor how much it amounted to in all. And it was spent by her, as the answer states, in procuring furniture and other articles for the use of the family. money given to her as presents by her children, seems to have been inconsiderable in amount, and the testimony in regard to it, is vague and unsatisfactory. The allegation that there was an agreement between her and her husband, to the effect that the money received by her from the different sources before mentioned should be hers, in her own right, is not sustained by the evidence; and if she really took the money as her own separate funds, it was all spent, or nearly so, before the deed was executed to her. She had Paone then in hand to pay over, and she paid none. But even if such agreement had been made, and even if she had kept

the money as her own, and paid it over as a consideration for the conveyance, it could not avail to sustain this deed, as against the creditors of her husband, under the circumstances of this case. It was in truth his money. The wife's earnings and the avails of her labor, during coverture, belong to her husband, and he cannot, as against his creditors, give or agree to give them to her, nor can she justly claim, that property purchased with them, in her name, is hers, and not subject to be taken for his debts. Skillman v. Skillman, 2 Beas. 403; Belford v. Crane, 1 C. E. Green, 265.

I am of opinion, therefore, that the conveyance to Mrs. Reford cannot be sustained upon the ground that it was for a good and valuable consideration.

Is the conveyance void by reason of the indebtedness of Reford at the time of its execution, or because it was made in view of his future indebtedness, as charged by the complainants?

There is evidence that Reford was at the time of that conveyance in debt to several different persons. Some of those debts, but not all, have since been paid. Among those not paid, is the debt of about \$100, due to Ehlers, for teaching his daughters music. For the rent of the Pocahontas mill, (hereinafter mentioned), which accrued from October, 1858. to April, 1859, Reford gave his note, indorsed by Corw in one of the complainants, at his request, to Mr. Kay, and the note having been duly protested for non-payment, s- 1 Corwin becoming fixed as indorser, he was compelled to it; and the sum so paid by him, is a chief part of the claon which his judgment against Reford was recovered. complainants insist, and I think correctly, that this should considered as an indebtedness existing prior to, and at time of the conveyance to Mrs. Reford. It is a part of debt, which by the lease, he bound himself to pay. gation to pay rested on him before and at the time of conveyance, though this portion of the rent did not acc till afterwards. Nor does it make any difference, that win, by paying off the note he had so indorsed, became the

creditor of Reford, in the place of the original payee. The obligation resting upon Reford was not thereby in any wise changed, except as to the person to whom the debt was to be paid.

I will not remark further upon the indebtedness existing at the time of the conveyance, but will consider whether or not it was made in view of future indebtedness.

In the spring of 1858, some time in the latter part of the month of February, Reford commenced a negotiation for lease of a paper mill, near Morristown, known as the Poahontas mill, and it was continued through March and lown to the first of April, when a lease, dated on that day, vas executed between him and John C. Kay, whereby the nill and its appurtenances was leased by Kay to Reford or four years, commencing on that day, at a rent of \$960 a rear, payable half yearly. Reford was also to pay the taxes, and keep the machinery and premises in as good repair as they then were, and to pay the expense of insuring the mill against loss or damage by fire. The machinery was old, and not in good repair at the time of making the lease. entered into possession under the lease, and ran the mill until about the middle of April, 1859, when he gave it up, and went into business elsewhere. His business, while at the mill, resulted in a loss to him, caused, as he alleged, by an unusual scarcity of water, but said by others to be owing to the machinery being old and out of repair. It is certain, however, that he was unsuccessful, and that while running the mill, he contracted debts which yet remain unpaid, to a considerable amount, and among them are the debts of some of the complainants, and for which their judgments were ob-Upon an execution issued upon Corwin's judgment tained. he was arrested, and thereupon applied for the benefit of the insolvent laws, and after much litigation and delay, he was at length discharged as an insolvent debtor. When he rented the mill, he had little if any property, besides the house and lot at Bloomfield and his household furniture He had no capital or means, even to buy the nethere.

Cramer et al. v. Reford.

cessary stock for the purpose of manufacturing paper and carrying on the mill, for he bought it on credit, or with money raised on notes, indorsed for him, or lent to him by others. In this situation he stood when about to commence business at the mill, under a lease for four years, at an annual rent of \$960, besides payment of taxes, and cost of insurance. and the expenses of keeping the machinery and premises in repair. It was, to a man in his circumstances, an undertaking attended with some hazard, to say the least, and one in which he must certainly incur debts, in addition to his rent, and which, in case he should not be successful, he would have no means whatever to pay, except his property at Bloomfield. Yet, just before he executed that lease, and after he had agreed to take it, he began to take steps to convey away his house and lot, which, except his household goods, was all the property he had.

The deed from him to his son is dated 25th March, 1858. and it was, according to the certificate of acknowledgment indorsed upon it, acknowledged on the first of May following, by Reford and his wife. But Mr. McDonald, who drew the deed, and before whom the acknowledgment was taken, and who was called as a witness on the part of the defendants, says, that he thinks it was signed and acknowledged by Reford on the day it bears date, and that Mrs. Reford w & not then present, but came afterwards and signed and secknowledged it on the first day of May, and that he the wrote the certificate of acknowledgment, the same as if the Mr. McDon ≠ld had both acknowledged it on that day. further says, that when he received instructions to draw to he deed from Reford to his son, he was at the same time structed to draw the deed from the son to Mrs. Reford, = nd was also directed to hold the deed to the son as an escrow, until Mrs. Reford signed it, and that he did so hold it uzutil the first of May. The deed to the son was therefore 170t fully delivered, and did not operate as a conveyance $\mathbf{u} \mathbf{n}^{til}$ that time.

The deed from the son to his mother is dated on the third

Cramer et al. v. Reford.

of May, 1858, and was acknowledged the next day. Both deeds were recorded on the 17th of that month.

The testimony shows clearly, that about the time the deeds were delivered, and also afterwards, Reford represented to different persons with whom he was dealing, that he was the owner of the house and lot in question, and that it was clear of incumbrance, and he obtained credit, and accommodation indorsements, and discounts of notes, by that means. It seems to me, in view of the evidence, and of all the circumstances attending the transaction, that this is a plain case of a conveyance in view of future indebtedness on the part of Reford, and with an intent to place his property beyond the reach of his creditors, in case the business in which he was about to embark should be unsuccessful. Such a conveyance is fraudulent as against creditors, and will be set aside in Reade v. Livingston, 3 Johns. Ch. R. 500; this court. Beeckman v. Montgomery, 1 McCarter 106.

There is strong evidence of fraud upon the very face of the transaction, and without looking into the testimony which was offered, of the declarations made by Reford about the time he was preparing to lease the mill. Mr. Ehlers expressly states that Reford told him, about that time, that persons at Morristown advised him not to risk his property at Bloomfield in that undertaking, and that he ought to convey it to his wife. And Mrs. Reford, who was present at this conversation, expressed the same views, and wished to have the property conveyed to her, in order to put it beyond the risks of the business. And the witness says further, that about two months after that, they told him it had been This witness is, however, contradicted on this point as well as others, by both Reford and his wife, who were called and examined as witnesses for the defence, but under objection, made at the time, to their competency. I think that Reford was not a competent witness, and that his testimony must be excluded. He is testifying in favor of his wife in a civil suit, in which she is a party. The husband and wife cannot be witnesses for or against each other, where

Cramer et al. v. Reford.

either is a party in a civil suit. Trenton Banking Co. v. Woodruff, 1 Green's Ch. R. 131, and cases there cited; Bird v. Davis, 1 McCarter 467.

The testimony of Mrs. Reford, it may be said, stands on a different ground, as she is testifying in her own behalf, in defence of her own claim to real estate, the title whereof is now vested in her, and in which her husband has no right or interest, unless it be as tenant by the curtesy initiate, which will be perfected only upon the contingency of his surviving her. Her testimony is objected to on other grounds. But I do not think it necessary to consider them, for even if her testimony be admitted, and its full force given to it in the particulars in which she contradicts Ehlers, I think that the other evidence in the case clearly shows that the conveyance to her by her husband, through her son, was in view of future indebtedness, and for the purpose of placing the property beyond the reach of creditors.

I am, therefore, of opinion that the conveyance from Reford to his son, and from the son to Mrs. Reford, should be declared to be fraudulent and void, and be set aside, and that the complainants' judgments should be declared to be liens upon the house and lot in question, and that the property should be sold to satisfy the amount due upon them respectively, (subject however to Mrs. Reford's right of dower,) and that it should be referred to a master to ascertain and state the amounts due upon the judgments respectively, and their order in regard to priority, and that further directions be reserved till the coming in of the report. And I respectfully recommend to the Chancellor to make an intextocutory order and decree accordingly.

THE MORRIS CANAL AND BANKING COMPANY vs. FRANZ O. MATTHIESEN and ALFRED WIECHERS.

- 1. This court has the power to construe a written instrument, upon a motion to dissolve. But it is a matter resting in the discretion of the court, to be exercised according to the nature and circumstances of each particular case.
- 2. But the power will not be exercised, where the ends of justice are more likely to be attained by deferring the construction till the final hearing.
- 3. A written instrument must be construed according to the intent and meaning of the parties, as manifested by the instrument itself. Yet, where the construction is doubtful, the court may look into the surrounding circumstances, and avail itself of such light as they may afford in ascertaining the true meaning of the terms and language employed.
 - 4. The ex parte affidavits were properly used on the argument.

This cause was argued before J. Wilson, esq., one of the masters of the court, upon a motion to dissolve the injunction, upon bill, answer, and ex parte affidavits.

Mr. Gilchrist and Mr. Bradley, for defendants, in support of the motion.

Mr. Zabriskie and Mr. I. W. Scudder, for complainants, contra.

THE MASTER. The complainants, in their bill, state that in the year 1859, they constructed in the waters of the Hudson river, within this state, south of the eastern terminus of their canal, and adjoining lands above high tide, owned by them in Jersey City, a certain basin, by sinking crib-work of timber, filled with stone. That the making of said basin was necessary to the operation of their canal, and to the business conducted thereon, and that by means of the matters particularly set forth in their bill, they had full right to construct the said basin, and are the owners and possessors in fee of the same, except a certain part, which they conveyed Vol. II.

to the New Jersey Central Railroad Company; and that the defendants are unlawfully proceeding, with a large number of men, to tear up a portion of said crib-work in a forcible and violent manner, and thereby do irreparable damage to the complainants.

The defendants, by their answer, deny that the complainants had any right to make said basin, or that the same is, or ever was, necessary to their canal, or to the business conducted thereon, or that the complainants have, or ever had, lawful title thereto, or possession thereof, in whole or in part. They further say, that said crib-work is a serious obstruction to the navigation of the waters of the Hudson river and Communipaw bay, and is a common and public nuisance, and works a special injury to the defendants. That the defendants are, and for many years have been, the owners in fee of a certain block of ground and certain premises, called the sugar-house property, situate in Jersey City, and adjoining upon said waters; and that they, and those under whom they claim, always had, and still have, the right to navigate and use said waters, and to pass, with vessels and boats, to and from their said property, and the channel of the Hudson That their business, conducted on said property, is large, and such right is of very great value to them. That said crib-work, sunk by the complainants in forming said basin, being an unlawful obstruction to the navigation of said waters, and a common and public nuisance, and a great injury to the defendants in particular, they had a right to remove the same, or any part thereof; and that in the exercise of such right, they proceeded to take up a portion of the same, with such number of men as was necessary for the purpose, and without any breach of the peace, and that said proceedings are the acts complained of, and to restrain which the injunction was granted.

Prior to the filing of this bill, there had been litigation in this court, touching the right to said basin, to which the complainants and defendants in this suit, and also the New Jersey Central Railroad Company, were parties, and the matters in controversy therein, were settled by compromise.

On the 19th of November, 1863, an agreement in writing was entered into, between the New Jersey Central Railroad Company, party of the first part, and said canal company, of the second part, and said Matthiesen and Wiechers, of the third part; which agreement is set forth in the pleadings in this case, and the second article whereof is as follows:

"That the party of the second part agree to, and do hereby, grant to the parties of the third part, their heirs and assigns, proprietors and occupiers of the said sugar-house property and the said block, a passage-way for the navigation of vessels doing business in connection therewith, to and from the said block and the channel of the Hudson river, by a canal one hundred and fifty feet wide, along and from the south side of said block, to the said basin, and a convenient passage-way across the same, to the said channel; and the party of the first part assents to the said grant."

The true construction of this agreement, and of this second article in particular, is a point of the highest importance in this case, and the decision of it will settle rights and claims of very great value to the parties.

The complainants insist that the "canal of one hundred and fifty feet wide, along and from the south side of said block to the said basin," mentioned in the agreement, means a canal to the outside of said crib-work; and that they have cut an opening of thirty feet in width in said cribwork; and that the defendants have a convenient passage way from their said property through said opening, and across said basin, to the channel of the Hudson river. They also insist that any right which the defendants may have had, before the making of said agreement, to navigate said waters, in passing to and from their said property and the channel of said river, was given up by said agreement, and the passage-way therein stipulated for and granted, was accepted by them in lieu thereof.

The defendants, on the other hand, insist that it was meant and intended by the parties, in and by said agreement, and

that the true construction thereof requires, that said canal of one hundred and fifty feet in width, should be made from their said property to the waters of the said basin, and not merely to the outside of said crib-work, and that the making of said opening of thirty feet in width is not a compliance with said agreement, nor according to the intent and meaning thereof, and that said opening is entirely too narrow, and does not give to the defendants a convenient passage-way, as stipulated for in the agreement. And further, that by said agreement, the defendants did not relinquish the right which they before had to navigate the waters of said river and bay, and to remove therefrom unlawful obstructions, but that they still have such right, and, in addition thereto, the rights granted by said agreement.

If the court should now proceed to decide upon the construction of said agreement, its decision would be final, and rights and claims of a highly valuable and important character would be thereby definitely settled, so far as this court is comcerned. I have no doubt of the power of the court to construe an instrument of writing, upon a motion to dissolve, and some cases it would be its duty to do so. But it is a matter =1ways resting in the discretion of the court, which is to exercised according to the nature and circumstances of ezech This is in accordance with the doctrine held particular case. in Clum v. Brewer, 2 Curtis C. C. R. 518, where, upon motion for an injunction, the judge said, he felt it to be zis duty to construe a certain written instrument before him that case; but he added, "there may be cases in which there is so much doubt what the parties to an instrument intended コnd to effect by it, that the court may think it proper to suspebe its judgment, until the surrounding circumstances can more fully and safely examined on a final hearing."

The agreement in the present case, as set forth in the pleadings, is before the court, and it must be construed cording to the intent and meaning of the parties as matrifested by the instrument itself. Parol evidence is not admissible to contradict or vary its terms. Yet it is a well

tablished rule, that where the construction of a written inrument is doubtful, the court may look into the surroundg circumstances, and avail itself of such light as they may ford in ascertaining the true meaning of the terms and nguage employed. 1 Greenl. Ev., § 275, 287.

This motion has been argued upon bill and answer, and rtain affidavits taken by the parties. They were all taken parts, and copies having been served upon the other party, cording to our rules of practice, the affidavits were prorly used on the present argument.

But the question of the true construction of this agreeent, is one which I deem of so much consequence in this se, that it ought not, in my opinion, to be decided as the se now stands. It will be more satisfactory to the court, id more likely to attain the ends of justice, to examine and ecide it at the final hearing, after each party shall have id an opportunity of cross-examining the witnesses of the her, and of showing fully before the court, all such surunding circumstances or other matters, as under the rules evidence may properly be shown, and may assist the court ascertaining the true meaning and construction of the greement in question.

I am, therefore, of opinion, that the motion to dissolve ould be denied, and that the costs of this motion should side the event of the suit, and I do respectfully recommend the Chancellor to make an order to that effect.

HOMAS GALWAY, PHELIPE W. CASADO, and DANIEL W. TELLER, partners, vs. Almira V. N. Fullerton, Alfred B. Fullerton, and others.

Equity will not, by the application of strict technical rules of law, clare void, contracts which have been fairly entered into, and where the ds of justice would be thereby defeated.

- A mortgage, given by a member of a firm to the firm, is valid; it is in no sense a mortgage to himself.
- 3. A husband is not a competent witness in a suit, in the event of which his wife has a direct interest.
- 4. A mortgage, given by a married woman, upon her separate estate, acknowledged in conformity with the statute, and joined in by the husband, is a valid security, and will be enforced, both at law and in equity.
- 5. A bond and mortgage is a chose in action, and as such may be assigned by mere delivery, and without writing, and the assignment, in equity, would be good.
- 6. It is not necessary to the validity of an assignment of a mortgage by a firm, to secure a partnership debt, that it should be executed by all the members of the firm, though they were all joined by name, as mortgages.

This cause was argued before Jacob Weart, esq., one of the masters of the court, who was called by the Chancellor to advise with him upon the hearing of the same.

Mr. A. S. Boyd and Mr. Ransom, for complainants.

Mr. C. Parker, for defendants, Fullerton and wife.

THE MASTER. The bill in this case was filed to forecly a mortgage. The case comes before the court upon by answer, replication, and proofs. Prior to the eleventh dof March, eighteen hundred and sixty-four, the defendant Alfred R. Fullerton, was in co-partnership with Orville Ordiname, style, and firm, of Oddie, St. George & Co., in the city of New York, as brokers.

It appears that the defendant, Fullerton, without the knowledge or consent of his partners, used for his own purposes, the money of the firm, to the amount of \$31,500, which was lost. It also further appears that on his private account he had drawn \$20,000 in advance of his partners; making his drafts upon the firm in excess of his partners, to the amount of about \$50,000. But the whole controversy in this suit is about the draft of \$31,500. When this was

iscovered by the other partners, Oddie and St. George, they assisted that Fullerton should secure the amount. This Fulrton agreed to do, and accordingly, on the 19th day of farch, 1864, he, with his wife, Almira V. N. Fullerton, excuted a bond, and secured the same by a mortgage on his rife's separate estate for \$20,000, the mortgage being exented to "Orville Oddie, Christopher R. St. George, and alfred R. Fullerton, doing business in the city of New York, nder the name and firm of Oddie, St. George & Co.;" and he said Fullerton gave his own note to the firm for \$10,000 nore.

The firm held this mortgage, and being indebted unto he complainants in a sum exceeding \$20,000, did, on the 9th of July, 1864, assign said bond and mortgage to them, s a security for the payment of the firm debt. The assignment was made in this form: "We, Orville Oddie and Chrisopher R. St. George, of the city of New York, bankers and rokers, general partners of the firm of Oddie, St. George & Company;" the defendant, Fullerton, not joining in the ssignment. It is proved that the firm of Oddie, St. George & Co., still owe the complainants over \$20,000, and that no art of the debt for which this mortgage was assigned has seen paid.

The defendant, Fullerton, insists that the bond by a man behimself is void ab initio. It constitutes no debt. A man annot owe himself. He insists, likewise, that the mortgage f a married woman, to secure her husband's debt to himself and two others, ought not to be enforced in equity. Maried women should be protected from their husbands. That was the intent and policy of the act respecting the property of married women.

The defendant further insists that the assignment is void. A mortgage to three, requires assignment by three. The obvious intent of so making it, was to restrict its transfer.

In relation to the bona fides of this transaction, I have no loubt that it was the intention of Fullerton and wife to pledge the wife's private estate to the firm, for the purpose

of securing the secret over-draft of her husband upon the firm of which he was a member; and that the security thus held by the firm of Oddie, St. George & Co., was assigned by them to secure a debt due to the complainants from said firm, there can be no doubt. Under such circumstances it is the duty of a court of equity to compel the fulfillment of the contracts thus made, if it can be done at all, with any consistency, by the application of equitable principles and rules. And it will not declare as void, contracts which have been fairly entered into, and which will defeat the ends of justice by the application of strict technical rules of law.

Was this bond and mortgage made by an individual to himself, and therefore void? I think not, in any sense of the term. It was a bond and mortgage from Fullerton and wife, to the firm of Oddie, St. George & Co., and the individual members of the firm being mentioned in the mortgage, that of Fullerton necessarily appeared as one of the members of the firm. If it was the execution of a mortgage by a man to himself, it would be, after execution, necessarily his individual property; but was this mortgage, after execution and delivery, the individual property of Fullerton? Certainly not. It belonged to the firm, and became one of the assets of the firm; it was liable for the firm debts, and not liable for the individual debts of the members of the firm until all the firm debts were paid.

Again: it is every day's transaction for individuals to give mortgages and other securities to corporations of which they are corporators and directors. But it may be said that this can be done, as a corporation is an artificial person. So is a firm. A corporation acts by its common seal; a firm, by its firm name and title.

I look upon this transaction as Almira V. N. Fullerton's coming forward to pledge her separate estate to secure the firm of Oddie, St. George & Co., against loss from the overdraft of her husband. Suppose she could have executed, without her husband's joining, this mortgage to the firm of which he was a member; could it be questioned in any way,

except as a contract between husband and wife? and is it in reality such a contract, when it is made to three individuals composing a firm, even if one of the individuals should happen to be her husband?

The husband, in this case, joins, not as mortgagor in reality, but for the purpose of assenting to the wife's execution of the mortgage, as it would be void without such assent. I reating it in that light, the husband joined to give effect to he contract of the wife, and the mortgage being to the firm, in the recital of the names of the individual members composing the firm, that of Fullerton necessarily appears. Therefore, if it is the mortgage of the wife to the firm, and the susband joins to give validity to the contract, is it in any sense, a mortgage from a man to himself?

Again: it was said upon the argument that equity will strike out the name, and allow the mortgage to stand for the purpose and intent for which it was executed; or that equity would treat the three partners as holding the security in trust for the two; but I incline to base my opinions upon the view expressed above.

Numerous cases were cited on the argument, to show that individuals composing a firm, could deal with the firm. In the case of Baring et al. v. Lyman, 1 Story's R. 423, Story, J., says: "A firm may negotiate its own paper to one partner, and the latter will thereby become the owner thereof; and on the other hand, a firm may take a separate negotible security from one of its partners, and hold and use the ame for its own purposes." In the case of Gridley v. Dole, Comstock's R. 492, it was held that, "if one partner gives he other his promissory note, or separate acceptance, for alue received, in the partnership account, an action will lie in such note or bill."

Fullerton, the defendant, was examined in this cause, but is wife having a direct interest in the event of the suit, his estimony upon grounds of public policy, must be considered sout of the case. Bird v. Davis, 1 McCarter 478; Staats r. Bergen, ante, p. 297.

The objection that the wife's property must be protected in equity from the debts of her husband, is answered by saying that it is so protected, until she does, by her voluntary act, free from the threats or compulsion of her husband, make it so liable, by the execution of a deed or mortgage; and when she executes a mortgage, and acknowledges it in conformity with the statute, and the husband consents to the execution by joining in the mortgage, it becomes a valid security, and will be enforced both at law and in equity.

Treating this bond and mortgage after its execution and delivery to the firm, as a good and valid security, in the possession of the firm, and as belonging to the firm assets, we come to the question; can two members of a firm assign the firm assets in payment of, or as collateral for the payment of a firm debt?

A bond and mortgage is a chose in action, and as such, may be assigned by mere delivery, and without writing, which assignment in equity would be good. Wilson v. Troup, 2 Cowen's R. 231; Jackson v. Willard, 4 Johns. R. 41; Precott v. Hull, 17 Johns. R. 292; 1 Parson on Con. 197, and numerous cases there cited.

Treating this bond and mortgage as a chose in action belonging to the firm, any member could have assigned it by mere delivery to the complainants in payment of their debt, and equity would hold the assignment good; that being the case, the signature of Fullerton was not necessary to the assignment, it was perfectly good without the written assignment under the hands and seals of the two partners, which accompanied the bond and mortgage.

The right of one member of the firm to deal with and dispose of the choses in action of the firm, is too well settled to need the citation of authority. In the case of Everit v. Strong, 5 Hill's R. 163, Cowen, J., says: "No doubt one of several partners has power to assign a demand due to the firm. He has power to sell any of the effects belonging to the partnership. He may negotiate its paper by endorsement or otherwise. The same principle which gives him such authority,

extends it to the equitable assignment of a chose in action. That a partner superadds a seal to an assignment will not vitiate it, any more than it would a sale of goods made by him under his hand and seal." In the case of Tapley v. Butterfield, 1 Metc. R. 515, Shaw, C. J., says, it is within the scope of the partnership authority to pay the debts of the firm, and to apply the assets of the firm for that purpose, and that a mortgage made by one partner in the absence of the other, although unnecessarily made by deed, was binding upon the property, and constituted a valid lien.

I am of the opinion that the assignment of the mortgage in this case, by two members of the firm, is a good and valid assignment in equity.

My conclusion is that the complainants are entitled to the relief prayed for, and I advise the Chancellor that a decree be entered accordingly, and that it be referred to one of the masters of the court, to take an account of the amount due on the complainants' mortgage, and of the amount due on the mortgage of the defendant, William R. Allen, and as to the priority of said mortgages.

WILLIAM H. POTTS vs. THE NEW JERSEY ARMS AND ORD-NANCE COMPANY.

- 1. Under the act of March 13th, 1866, (Pumph. L. 296,) the receiver should be vested with large discretionary powers as to the mode of sale.
- 2. The act of March 13th, 1866, investing the Court of Chancery with the power to order the property of an insolvent corporation, encumbered with mortgages or other liens, the legality of which is brought in question, &c, to be sold clear of encumbrances, is not in violation of the constitutional provision, forbidding the passage of a law impairing the obligation of contracts, &c. Const., Art. IV, sec. VII, § 3. It neither impairs the obligation of contracts, nor deprives the creditor of any previously existing remedy.
- 3. A remedial statute, superseding a remedy in force at the time of making a contract, and giving the party satisfaction in a shorter time and more direct mode, does not deprive him of a previously existing remedy.

- 4. Property, ordinarily treated as personal, is often annexed to and passes with the realty as fixtures, where it manifestly appears from the description and terms of the instrument, that such was the intention of the parties.
- 5. The registration of a chattel mortgage is not necessary to pass the interest in machinery fixed to the soil, and comprehended in a mortgage of the realty, where it is the intention of the parties, as shown by the terms of the instrument, that the machinery should pass with, and as a part of the freehold.

Upon bill filed, "the New Jersey Arms and Ordnance Company" was, on the 4th day of April, 1865, declared insolvent, and a receiver appointed, in pursuance of the statute in this state, entitled "An act to prevent frauds by incorporated companies," (Nix. Dig. 371). By this decree, operating as a statutory assignment, all the property of the company, real and personal, passed to the receiver, subject to the liens then existing.

The factory and buildings of the company, situate in the city of Trenton, with the machinery, fixtures, tools, &c., therein, were, at the time they passed into the hands of the receiver, subject to two mortgages; the first, given by the Trenton Locomotive and Machine Manufacturing Company, tormerly holding the premises, dated April 1st, 1856, to Joseph G. Brearley, trustee, &c., purporting to secure the payment of fifty bonds, of one thousand dollars each; the second, by the New Jersey Arms and Ordnance Company, to Joseph G. Brearley, trustee, &c., dated October 5th, 1864, 10 secure one hundred bonds, of the sum of one thousand dollars each, and fitty bonds, of the sum of five hundred dollars each, amounting, in the aggregate, to one hundred and twentyfive thousand dollars. The obligation of these mortga gres, and of the bonds which they purport to secure, (thir teen bonds under the first mortgage only excepted), are called in question in the bill filed.

An application was made to the Chancellor, on the petition of the complainant, for an order to direct the receiver to sell and dispose of the real and personal property of the

company, free of the encumbrances of the said two mortgages, the proceeds of such sale to be paid into court to abide the event of the suit.

The Chancellor denied the application, on the ground that such order was not within the power of the court. This opinion has been sustained by the Court of Appeals.

By an act approved March 13th, 1866, (Pamph. L. 296), it was enacted, that where the property of an insolvent corporation, in the hands of a receiver under the act, is encumbered with mortgage or other liens, the legality of which is brought in question, and the property is of a character materially to deteriorate in value pending the litigation, the Court of Chancery may order such receiver to sell the same, clear of encumbrance, at public or private sale, for the best price that can be obtained, bringing the money into court, there to remain, subject to the same liens and equities of all parties in interest as was the property before it was sold, to be disposed of as the court, by its decree, should order and direct.

Subsequent to the passage of this act, the receiver filed his petition, in which, after setting forth that, as receiver, he came into possession of the real and personal estate of said company, consisting of the armory buildings, machinery, &c., and a large amount of personal property, &c., subject to said two mortgages, that the legality of the liens of said mort-Rages is one of the principal matters in dispute in the cause, and that the said last mentioned mortgage had, on January 30th, 1865, been filed as a chattel mortgage in the office of the clerk of the county of Mercer, but that the same had Not been re-filed within the time limited by the act, but was re-filed February 5th, 1866, the receiver prayed the instruction of the court, whether the lien of the said last mentioned mortgage, so far as respects the personal property, is not lost or destroyed, and whether he may not sell and dispose of the same, according to the statute, free of encumbrance.

The receiver, further alleging that the said property, real and personal, was rapidly depreciating in value, and that it Vol. II. 2L

could then be sold to more advantage than thereafter, further prayed the court for authority to sell the same, free of encumbrance, the proceeds to be paid into court, to abide its order.

A rule was granted to show cause why the said application should not be granted, with leave to take affidavits, &c.

Affidavits were taken, and the motion argued before Thomas P. Carpenter, esq., one of the masters of the court, sitting for the Chancellor.

Mr. Van Syckel and Mr. Browning, (with whom was Mr. E. T. Green), for petitioner.

Mr. J. T. Williams, (of New York), contra.

THE MASTER. I find no technical difficulty in hearing this motion, on the ground of res judicata, suggested by the counsel of the mortgage creditors. The Chancellor, on a former application, made no decision further than that, as the law then stood, he had no power to make the order prayed for.

In my judgment, the affidavits taken in this case, and the nature of the property, show, beyond all question, that the property of this insolvent corporation is rapidly deteriorating, and is becoming of less value every day.

There is a great contrariety of opinion among the witnesses whose depositions have been produced, as to the best mode of making this sale; whether the property should be put up as a whole and sold as it stands, with all its machiner and fixtures, as a factory for the manufacture of arms and ordnance, or whether it should be sold by piece-meal. The inclination of my mind, after examining the affidavits, looking to the reasons given, in connection with the situation and value of the property, is to the opinion that it is not probable purchasers could be found for the property as a whole, and that necessarily it must be broken up and sold separately.

But it is not necessary, under the view which I take of this application, to settle definitely at this time the precise mode

of sale. The receiver is an officer of the court, selected as disinterested and impartial towards the parties in respect to the matters in controversy. As such officer, acting under oath, entitled to the instruction and indemnification of the court whilst proceeding fairly and honestly in the discharge of his duties, it is the policy of the statute that he should be invested with large discretionary powers, and if this application can be granted, I am of opinion that the receiver should be directed to proceed and sell the real and personal property, either in bulk or in detached parts, as he may find it expedient. He may find it expedient and for the advantage of his trust to sell the real estate, with a certain part of the machinery, together, and the residue of the machinery, tools, and personal property in lots; or he may find it most for the interest of those concerned to sell all the machinery, fixtures, and tools in detached lots. Satisfied that it is not only the duty but the desire of the receiver to make this property produce the most money possible for those entitled to the proceeds, my opinion is that the mode of sale should be eft to his discretion; the utmost possible publicity to be given however, to the time and mode of sale. It being further understood, that as the proceeds are to be distributed among lien creditors and general creditors, those proceeds which may arise from property subject to liens, should be accurately ascertained and distinctly preserved in the accounts of the receiver.

But this application has been earnestly and ably resisted on the part of the lien creditors, not only on the ground of expediency, but also on the ground of the alleged want of legal power in the court. It is urged that the act of March 13th, 1866, impairs the obligation of contracts, and further, that it deprives the mortgage creditors of a remedy for enforcing their contract which existed when the contract was made, and that, therefore, as against them, the law in question is unconstitutional and void. Const., Art. IV, Sec. 7, § 3.

I am unable to see that this act in any way impairs the obligation of the contract. The rights of the mortgagees



stand unaffected by the act of 1866, or by any proceedings under that act. The proceeds of any sale made in pursuance of the powers vested in the court, are to be brought into court, there to remain, pending the litigation, subject to the same liens and equities of all parties in interest as was the property before sale. It is scarcely necessary to refer to the numerous cases cited by the counsel on both sides, on the constitutional question. If there is any difficulty, it arises from that clause in our constitution, originating in, if not still peculiar to it, which forbids the legislature to deprive a party of any remedy for enforcing a contract which existed at the time the contract was made. The construction of this clause is still to be settled; the case of Martin v. The Somerville Water Power Co., 5 Am. Law Reg., (May, 1857,) p. 400, scarcely reaching the point as here presented.

The cases of Bronson v. Kinzie, 1 Howard 311, and McCracken v. Hayward, 2 Howard 608, satisfactorily established the doctrine, that whatever belongs merely to the remedy might be altered or taken away according to the will of the state, provided the alteration did not impair the obligation of the contract. But if that effect was produced, it was immaterial whether it was done by acting on the remedy, or directly on the contract itself. In either case it was prohibited by the constitution. In those cases it was held that state laws, which, in form professing to effect the remedy merely, yet in their operation amounted to a denial and obstruction of rights under contracts, as respected contracts made before the passage of such acts, were unconstitutional and void.

It is probable this clause in our constitution was introduced in reference to the principle settled in the cases to which I have referred, and possibly as declaratory of that principle, and to give it greater certainty in its application. The form of expression used is to be noted. It is that the legislature shall not pass any law depriving a party of any remedy for enforcing a contract, &c.; it is only the depriving, or taking away a substantial remedy previously existing for the en-

forcing of a contract. It does not, in my judgment, relate to any change of practice in reference to remedies, as the making of a longer or shorter notice necessary, dispensing with or adding to the formalities necessary in legal actions, &c. Nor, as it seems to me, is it within the terms of the constitutional provision, and it does not deprive one of a previously existing remedy, that such remedy has been suspended and made unnecessary by some remedial statute which gives him satisfaction in a shorter time and more direct mode.

Now here, by the act to prevent frauds by incorporated companies, a remedial act for the protection of their creditors by proceedings in the nature of bankruptcy, the operations of insolvent corporations are abruptly brought to a full stop. Their property is taken in charge by officers of this court. Without disturbing liens, or destroying the priority of mortgage and judgment creditors, the property and assets of such corporation, so in the custody of the law, are to be sold, and the funds distributed among creditors proportionally to the amount of their respective debts. This act has been long in force. It has often superseded, but not destroyed, remedies rendered unnecessary by its remedial and beneficial But as in the case before us, the mortgage liens provisions. may be disputed. The consequent litigation may by possibility be tedious, and extend through a considerable period of time, whilst the property may be liable to deterioration. During the delay the property so held may be subjected to great injury and consequent loss, if it must be held in the same form until the litigation is closed, and the rights of the parties ascertained. Can it be said to deprive a lien creditor whose claim is in whole, or in part, in dispute, of any previously existing remedy, that this remedial statute is extended to meet such an exigency, his lien or preference if established, being preserved to the proceeds of the sale?

It may also be suggested, that under these bankrupt proceedings, the whole jurisdiction in respect of the property of the corporation is vested in and belongs to the court in which, under the statute, these proceedings have been commenced.

Any attempt to proceed elsewhere by foreclosure or otherwise, may be met by plea, whilst it would still be competent and perhaps expedient for the mortgage creditors, by crossbill, or by bill in the nature of a cross-bill, in the same court, to vindicate their rights, and to ask such redress as their case may require.

This case stands on such different footing from that under the private act of the legislature discussed by Justice Grier, in the case of Martin v. The Somerville Water Power Company, that I do not think it necessary to add anything further under this head. I am of opinion that there is no want of legal power arising out of the constitutional provision, and that the mortgage creditors have not been deprived of any remedy previously existing. I should hesitate, if I considered the point doubtful, to declare the act of the legislature inoperative on this ground, and could only do it if I considered it beyond question. But my mind has fully arrived at a different conclusion.

The receiver, in his petition, prays to be instructed as to the lien of the mortgage as respects the machinery and personal property, and whether lost by the omission of the mortgagee to re-file within the time limited by the act of 1864, concerning chattel mortgages. Pamph. Laws, p. 493.

I am not aware that under the rule in this cause I can now authoritatively decide this question. I can, however, express my views as the reasons for settling to a considerable extent, the mode under which I consider the sale ought to be made.

Both mortgages to which I have referred, in terms substantially the same, purport to convey in pledge, all the buildings, factories, and shops, &c., with all the machinery, fixtures, engines, tools, and property of every kind, on the premises. The question now to be discussed, I suppose however to arise, chiefly, if not altogether, under the second mortgage. It seems to be assumed in the petition filed by the receiver, as also in the argument of his counsel, that the machinery and fixtures in this factory could be subject, as

against other creditors and against the receiver, to the lien of this second mortgage, only as a chattel mortgage, and that such lien was necessarily lost by the failure to file a second copy of the mortgage, as prescribed by the act to which I Possibly this might be so, if the assumption have referred. were true that the machinery, &c., could only be held by this mortgage as a chattel mortgage, though I have some difficulty in my own mind in coming to this conclusion. It may admit of question whether, when this property, by virtue of this statute of bankruptcy and under the decree of the court, passed into the custody of the law, and was held by the receiver as the trustee of the corporation and of its creditors, the rights of all parties were not fixed at that very instant. Without attempting to decide it, as the point has not been argued by counsel, I suggest it as doubtful, whether the holder of a chattel mortgage is held to further diligence and is not entitled to rest upon his rights, whatever they were, when the property passed into the hands of a receiver, his trustee, as well as the trustee of the other creditors and of the corporation.

But I do not assent to the proposition that the machinery and fixtures comprised in the terms of the mortgage are in this case to be held and treated as personal property, or that the mortgage in respect of them, is to be treated as a chattel mortgage.

Whether property, which ordinarily is treated as personal, becomes annexed to, and goes with the realty as fixtures or otherwise, must depend upon the particular circumstances of each case. The rule, as is well known, is differently applied, as the question may arise between landlord and tenant, heir and executor, mortgagor and mortgagee, &c. The rules which relate to trade fixtures, as between landlord and tenant, have but slight application to questions between grantor and grantee, in the case of mortgage or other conveyance. It was held, in a well considered case, expressly approved in our own courts, that the true criterion of a fixture might appear in the application of the following requisites: 1. By

actual annexation to the realty, or something appurtenant thereto; 2. By their application to the use or purpose to which that part of the realty, with which connected, was appropriated; 3. By the intention of the party making the annexation, to make a permanent accession to the freehold. Under this head of intention may be the annexation of fixtures by the agreement of the parties, as in a mortgage by such general or specific description as shall evince an intention to convey fixtures as a part of the freehold. the conveyance by mortgage or otherwise, of a factory or mill, by any general name or description, with all its machinery, fixtures, and tools, such a factory or mill, with all its machinery and fixtures, and all necessary parts of the establishment, however slightly annexed, will pass with the freehold by such description. And things ordinarily personal in their nature, but fitted and adapted to be used with the real estate, and necessary for its beneficial enjoyment in the character in which conveyed, will pass with the realty by such description, which would not pass by an ordinary conveyance of land with its appurtenances. It is because of the intention evinced by such description and such terms. that they will pass. Teaff v. Hewitt, 1 Ohio State R. 511; Ibid. 1 Am. Law Reg. (Oct., 1853), p. 723; Brearley v. Cox, 4 Zab. 287; Crane v. Brigham, 3 Stockt. 35; Mather v. Fraser, 2 Kay & Johnson 536; Waterfall v. Penistone, 6 Ellis & Black. 876; Walmsley v. Milne, 7 J. Scott, N. S., (97 Eng. Com. Law) 114.

The mortgage now in question, purports to convey the factories and shops, with all the machinery, fixtures, engines, tools, &c.; which, I suppose, under the authorities cited, conveyed at least all the machinery, fixtures, &c., going to make up a factory of the character referred to in that instrument. In addition, more tools as well as materials and other property seem to have been pledged, to cover which it was necessary to file a copy of the mortgage in the clerk's office of the county. But so far as the machinery and fixtures were annexed to the realty, they passed as realty, and it was

unnecessary, in order to complete the lien as against them, to file a copy of the mortgage, as a chattel mortgage.

In England, the statute of 17 and 18 Vio., c. 36, requires the registration, in a mode prescribed, of bills of sale of chattels, by mortgage or otherwise, as against oreditors, &c., the possession remaining in the vendor. It was there held under that act, one much resembling our own, that registration, as a chattel mortgage, was not necessary to pass the interest in machinery fixed to the soil and comprehended in a mortgage of the realty, the intention of the parties, as shown by the terms of the instrument, being that the machinery should pass with, and as a part of the freehold. Mather v. Fraser, 2 Kay & Johnson 536; Waterfall v. Penistone, 6 Ell. & In the latter, the principle decided in the first Black. 875. case was recognized, but it was held not to be within it, the intention appearing on the face of the instrument, to mortgage the machinery separately, as personal property.

After inspecting the inventory filed by the receiver, I am unable, from anything before me, to discriminate between what is fixed machinery and passed with the realty, and what is mere personal property, and may, therefore, be unaffected by the mortgage.

In the order for the sale, which I shall recommend to be made, I would, therefore, have the receiver instructed to sell in such mode as that the proceeds of each class or description of the property may be readily discriminated, and the proceeds may be distributed according to the rights of the respective creditors, to be ascertained hereafter in this cause.

I respectfully recommend that the Chancellor order and direct the receiver to sell all the property and assets of the company, as authorized by the act of the legislature; that such sale be made in such mode and parcels, in bulk or in detached parcels, as he may deem most advantageous, provided, however, that the machinery and fixtures, and the tools, material, and other personal property, be sold separately, in such mode as that the proceeds of the sales of each descrip-

tion of property may hereafter be distributed among the lien creditors and general creditors, according to the right of the several creditors, when ascertained; that all publicity possible, be given to the time and mode of sale; and that the proceeds of such sale be brought into court, to abide the further order of the court.

NOTE.—This opinion was delivered at May Term, 1866, but is reported in this volume, in order to present together the history of the case. The opinion on appeal from the decree of the Chancellor, delivered at November Term, 1865, is reported post.

CASES

ADJUDGED IN

HE PREROGATIVE COURT

OF THE STATE OF NEW JERSEY,

MAY TERM, 1864.

HENRY W. GREEN, Esq., ORDINARY.

- The inventory and appraisement prescribed by the acts of 1856 and O. (Nix. Dig. 273, 274.) operate as a substitute for the inventory and aptement prescribed by the fourth section of the act of 1851, (Nix. Dig. .) and by the tenth section of the act of 1846, (Nix. Dig. 277.)
- In all cases where the intestate dies, leaving a wife or child entitled to benefit of the provisions of the acts of 1856 and 1860, (Nix. Dig. 273,) the inventory must be made by appraisers appointed by the surrogate, selected by the administrator, who are to be sworn by him before ering upon the performance of their duties, and to execute their office pursuance of the requirements of the act of 1856.
- . A promissory note taken in the name of the intestate, should not be itted from the inventory upon the claim of the wife that it is hers, being payment of the sale of a gift to her from her husband.
- . Gifts of chattels by the husband to the wife are void at law, though y may be sustained in equity. But even in equity, where a widow

^{*}HANIAH DILTS and others, appellants, and MARY STE-*ENSON, administratrix of Samuel W. Stevenson, de-*eased, respondent.

seeks to establish a gift from her husband in his lifetime, she must added evidence beyond suspicion, and nothing less will do than a clear irrevocable gift, either to some person as trustee, or by some clear and distinct act of his, by which he divested himself of the property and engaged to hold it as trustee for the separate use of his wife.

- 5. To constitute a perfect gift, the donor must part with the possession and dominion of the property. And if the thing given be a chose in action, the law requires an assignment, or some equivalent instrument, and the transfer must be actually executed.
- 6. The act for the better securing the property of married women, confers no power on the wife to take real or personal property directly by gift from her husband.
- 7. To bring property claimed by the wife within the protection of the statute, it must have been acquired by her in her own right, either before or after marriage. A purchase by her, or a mere gift by the husband to the wife, or a declaration by the husband that the property is hers, will not avail to defeat the claim of creditors or of the next of kin, after the death of the husband.

Mr. A. V. Van Fleet, for appellants.

Richey, for respondent.

THE ORDINARY. The administratrix having caused to be made and filed in the office of the surrogate of the county of Mercer, an inventory and appraisement of the estate of the intestate, exceptions thereto were filed by the intestate's next of kin. The cause was heard before the Orphans Court, under the provisions of the statute, (Nix. Dig. 579, § 16,) and the exceptions dismissed with costs. From that decree the exceptants have appealed.

The first exception to the inventory is, that the persons who assisted the administratrix in making the inventory and appraisement, had no authority to act as appraisers, not having been appointed and sworn by the surrogate. The second exception is, that one of the appraisers appointed by the surrogate to inventory and appraise the goods selected by the widow for the use of the family, made such inventory without having seen the goods so inventoried and appraised, and without knowing anything of their value.

On the tenth of September, 1862, the administratrix caused an inventory and appraisement of the entire estate of the intestate to be made by two disinterested freeholders. This inventory, proved by the administratrix and by the oath of one of the appraisers, was filed with the surrogate on the 12th of September. On the same day, on the petition of the administratrix, the surrogate appointed one of the original appraisers and a third person, to make an inventory and appraisement, under the provisions of the acts of 1851 and 1856, (Nix. Dig. 270, § 16, 273, § 35.) These appraisers having taken before the surrogate the oath prescribed by the statute, made an inventory and appraisement of the goods and chattels to the value of \$200, selected by the widow for the use of the family of the intestate, which is filed with the surrogate. This latter appraisement the court very properly rejected as illegal, but sustained the first inventory and appraisement as legal and valid.

It is not questioned that the original inventory and appraisement were made in compliance with the provisions of the tenth section of the act of 1846, (Nix. Dig. 277,) and in accordance with immemorial and approved practice, prior to the act of 1851. The inquiry is, to what extent the ancient law and practice are affected by recent legislation. provisions of the act of March 14th, 1851, (Nix. Dig. 269,) in no wise interfered with the duties of executors or administrators, prescribed by the act concerning executors. The statutes were not only upon different subjects, but the design and office of the inventory and appraisement prescribed by the fourth section of the act of 1851, were totally different from those of the inventory and appraisement required by the tenth section of the act concerning executors, (Nix. Dig. 277.)

But the scope of the act of 25th February, 1856, (Nix. Dig. 273), is much more extensive. It was evidently designed to embrace the provisions of two different statutes upon totally different subjects. The inventory and appraisement prescribed by the act appear to have been designed to perform a double office, and to operate as a substitute, not $2 \,\mathrm{m}$

Vol. II.

only for the inventory and appraisement prescribed by the

fourth section of the act of 1851, respecting executions, but also (in all cases coming within the purview of the act) for the inventory and appraisement required by the tenth section of the act respecting executors. The act requires that the appraisers shall be appointed by the surrogate, (not selected by the executor or administrator); that they shall act under the solemnities and obligation of an oath taken before entering upon the duties of their office; and that they shall appraise the property faithfully, honestly, and impartially, according to the true and intrinsic value thereof; thus protecting all the rights of the debtor's family and of creditors, and effecting all the purposes of the act respecting executions. The act also requires that the inventory and appraisement shall include all the property required to be inventoried and appraised by the tenth section of the act respecting executors, and shall be proved before the surrogate of the county where the deceased debtor resided at the time of his death, in the same manner as required by the said tenth section of that From the phraseology of the act, and from the proof of the inventory to be made before the surrogate, the inventory must, within the contemplation of the legislature, have been made and exhibited by the executor or administrator as well as by the surrogate; thus protecting the rights of all persons interested in the estate, and accomplishing all the purposes of the tenth section of the act concerning executors. By the fourth section of the act of 1856, all acts and parts of acts inconsistent with its provisions are repealed. operation of this statute in all cases coming within its purview, must be to supersede the inventory and appraisement required by the tenth section of the act respecting executors. The inventory and appraisement prescribed by the later act perform all the offices and accomplish all the objects required by the prior statute. It is a rule of construction that if the later statute prescribe the only rule that should govern in the case provided for, it repeals the original act. Sedgwick on Statutes 124. This construction of the statute I am in-

rmed has been adopted and acted upon by most of the surogates of the different counties, and perhaps by all of them. to benefit could result, but on the contrary embarrassment nd confusion, from having two inventories of the same proerty made by different appraisers. The act however applied nly to the estates of debtors, who leave a family or a wife This was the construction given to it by the irviving. upreme Court. As a consequence, where there was no exeution against the property, and no apprehension of insolency, the inventory required by the act of 1856, was ecessarily filed. And if the estate subsequently proved inolvent, or the claims of creditors absorbed the personal tate, a second inventory became necessary. This gave rise difficulty and embarrassment, especially where the proerty, as it frequently happens, had been disposed of, or placed eyond the reach of appraisers. By the act of 1860, (Nix. ig. 274), which is a further supplement to the act respectg executions, it is enacted that the provisions of that act ad of the several supplements thereto shall apply to the esite of any person who shall thereafter die intestate, leaving wife or child him surviving, whether such person shall be debtor or not. And goods and chattels of the estate of ach deceased person to the amount of \$200, shall be first eserved and set apart to and for the use of the family, before ny distribution or other disposition shall be made thereof. .ll acts and parts of acts inconsistent with the provisions of ne act of 1860, are, by the terms of the act, repealed.

It appears to me to be clear that the acts of 1856 and 1860, nough both supplements to the act respecting executions, and primarily designed for the purpose of protecting the ebtor's property against the claims of creditors, have not all indirectly changed, in a material degree, the statutes respecting the distribution of the estates of intestates, but that all have changed also the character of the inventory to be whibited by the administrator, in all cases where the intestate dies, leaving a wife or child entitled to the benefit of the rovisious of those statutes. The inventory of the estate in all

to the wife, that the exchange was robation, and that the husband read obtained the wife's consent to idence in the strongest light for rests upon a gift of the chattel ing coverture, and upon the rty as his wife's.

the wife are void at law, v. 1 Williams on Exrs 1 Roper on Husb. &

ks to establish a must adduce eviswill do than a clear son as trustee, or by some y which he divested himself of to hold it as trustee for the separate ser v. Hodge, 2 Swanst. 97; McLean v. escy 79; 1 Williams on Ex'rs 640; Mews v. av. 529. And to constitute a perfect gift, the part with the possession and dominion of the nd if the thing given be a chose in action, the an assignment or some equivalent instrument, sfer must be actually executed. 2 Kent's Com.

r the better securing the property of married rs no power on the wife to take real or personal ectly by gift from her husband. Her inability on law to take property by such gift or grant, the nature of the marriage relation. The design was not to disturb the nature of that relation, to enable her to receive and hold real and perty to her sole and separate use, so as not to be control, nor liable to the debts of her husband. lesigned to confer upon her the power of acusband's property, but to protect her own. Nor ed to confer upon married women the power of

such cases must be made by appraisers, appointed by the surrogate, not selected by the administrator, who are to be sworn before they enter upon the performance of their duties, and to execute their office in pursuance of the requirements of the act of 1856. I have arrived at this conclusion after much solicitude and consideration, in view of the embarrassments that have already resulted, and must hereafter result from so material a change in a long established law of daily application. Nor have I been insensible to the incongruity of effecting such radical changes in the laws relating to the settlement and distribution of estates, by laws primarily designed for another and a very different purpose. terms of the statutes appear to me too clear to admit of doubt. The inventory and appraisement filed by the administratrix not having been made by appraisers appointed and sworn by the surrogate, as required by the statute, and having no power or authority to act, was not a legal appraisement of the property, and should have been so declared by the court. In this regard the exception of the appellant should have been sustained.

The third exception to the inventory, and one more materially affecting the rights of the parties, is that the inventory exhibited is not a true and perfect inventory of the estate of the intestate, for that divers goods, chattels, and credits, in the exception particularly specified, were not inventoried and appraised.

The evidence shows that at the date of the appraisement, there was in possession of the administratrix, a promissory note, given by one Nathaniel Hart to the deceased, for \$250, which was not included in the inventory. It is claimed by the administratrix that the note was given for the purchase of a pair of horses which belonged to the wife, which were sold by the intestate to Hart, and the note taken in his own name. The evidence of the ownership of the wife consists exclusively, of repeated declarations made by the husband to different persons, that the horses belonged to the wife, that he uniformly spoke of them as her horses, that they were procured by the intestate in exchange for another horse which

the husband had given to the wife, that the exchange was made with the wife's approbation, and that the husband refused to make it till he had obtained the wife's consent to the bargain. Putting the evidence in the strongest light for the title of the wife, her title rests upon a gift of the chattel by the husband to the wife during coverture, and upon the constant recognition of that property as his wife's.

Gifts of chattels by the husband to the wife are void at law, though they may be sustained in equity. 1 Williams on Ex'rs 639; Washburn v. Hale, 10 Pick. 433; 1 Roper on Husb. & Wife 53; 2 Ibid. 152.

But, even in equity, where a widow seeks to establish a gift from her husband in his lifetime, she must adduce evidence beyond suspicion, and nothing less will do than a clear irrevocable gift, either to some person as trustee, or by some clear and distinct act of his by which he divested himself of the property and engaged to hold it as trustee for the separate use of his wife. Walter v. Hodge, 2 Swanst. 97; McLean v. Longlands, 5 Vesey 79; 1 Williams on Ex'rs 640; Mews v. Mews, 15 Beav. 529. And to constitute a perfect gift, the donor must part with the possession and dominion of the property. And if the thing given be a chose in action, the law requires an assignment or some equivalent instrument, and the transfer must be actually executed. 2 Kent's Com. 439.

The act for the better securing the property of married women, confers no power on the wife to take real or personal property directly by gift from her husband. Her inability at the common law to take property by such gift or grant, results from the nature of the marriage relation. The design of the statute was not to disturb the nature of that relation, further than to enable her to receive and hold real and personal property to her sole and separate use, so as not to be subject to the control, nor liable to the debts of her husband. It was not designed to confer upon her the power of acquiring her husband's property, but to protect her own. Nor was it designed to confer upon married women the power of

taking property from persons other than the husband. That they might do at common law. The difficulty was that when property was received by the wife, the husband was immediately invested with an interest in her estate, rendering it subject to his control and liable to his debts. It is apparent from the title as well as from the terms of the act, that this was the evil which the legislature designed to remedy. It does not even confer upon the wife the power of disposing of the property during coverture, nor disturb the marriage relation, or its consequent rights and duties in other respects. Naylor v. Field, 5 Dutcher 287; Walker v. Reamy, 12 Cases 410. To bring property claimed by the wife within the protection of the statute, it must have been acquired by her in her own right, either before or after marriage. A purchase by her, or a mere gift by the husband to the wife, or a declaration by the husband that the property is hers, will not avail to defeat the claim of creditors or of the next of kin, after the death of the husband. Gamber v. Gamber, 6 Harris 366; Keeney v. Gould, 9 Harris 355; Bradford's Appeal, 5 Cases 513; Glann v. Younglove, 27 Barb. 480.

There is no evidence in the cause sufficient to divest the property of the husband in the goods in question or to establish the title of the wife. The wagon and other chattels remained in the possession of the husband during his life, and at the time of his death. He exercised, so far as appears, absolute control over it. He sold the horses and took the note received in payment, in his own name. None of the property is shown to have been purchased or procured by means of the separate property of the wife. The property should have been included in the inventory, and the exception on this ground should have been sustained, even if the inventory had been in other respects valid.

The decree of the Orphans Court must be reversed, and the inventory and appraisement, to which exceptions have been filed, declared illegal, inoperative, and void. The exceptants are entitled to their costs in the court below, but not in this court. The original papers which have been sent up, are remitted with the cause to the Orphans Court.

Executors of Luse v. Parke.

- HIRAM H. KENNEDY and GABRIEL FIELD, executors of Shubal Luse, appellants, and WILLIAM A. PARKE, respondent.
- 1. An assignment of a legacy passes the whole right of the assignor: after such assignment, there remains in the assignor no distinct, subsisting right, capable of being assigned.
- 2. Where a legatee has assigned a legacy for a valuable consideration, it is no defense to an action brought by such assignee against the executors to recover the legacy, that they have paid it in good faith to a second assignee of the legatee, without notice of the previous assignment. No interest, legal or equitable, passes by the second assignment. But where, in point of fact, such payment was by note of one of the executors, given to the second assignee with full knowledge of the rights of the first assignee, the note was without consideration and void; and if paid at all, was paid a fraud of the rights of the first assignee, and constitutes no defense to his laim for the legacy.
- 3. A principal is not responsible for the fraudulent act of a special agent n a matter foreign to the transaction in which he was employed.

Mr. Dilts, for appellants.

Mr. Voorhees, for respondent.

THE ORDINARY. This proceeding was instituted by Parke, the respondent, in the Orphans Court of the county of Somerset, against the executors of Shubal Luse, for the recovery of a legacy, under the provisions of the statute. Nix. Dig. 588, \$65. The petition states that Shubal Luse, in and by his last will and testament, did, among other things, bequeath as follows: "I give and bequeath to my grand-children, John, George, and Henry, children of my deceased daughter, Eliza Ann, the sum of \$1000, each to receive one-third thereof, to be paid to him when he arrives at the age of twenty-three years." "If any of my said grandchildren shall die before he or they arrive at the age of twenty-three years, and without lawful issue, then it is my will that his or their share or shares of the said sum of \$1000, and the in-

Executors of Luse v. Parke.

terest thereof, shall go to the survivor or survivors of them, share and share alike." John Vandyke, one of the said legatees, attained the age of twenty-three years on the 11th of April, 1862, and thereupon, under the provisions of the will, became entitled to the sum of \$333.33.

The legatee, on the 12th of November, 1860, after heattained the age of twenty-one years, executed to Parke, the petitioner, an assignment of the legacy. The answer of the executors alleges, by way of defense, that Vandyke, the legatee, on the 29th of January, 1861, assigned the legacy, for a valuable consideration, to Richard S. Vliet. That notice was given to Hiram H. Kennedy, one of the executors, of the assignment of the legacy, and payment thereof requested. That on the 2d of February, 1861, the legacy was assigned by Vliet, for a valuable consideration, to Kennedy. That on the 5th of the same month of February, Vandyke, the legatee, released Kennedy from all demands which he then had, or could have, against him as his guardian, for any money due the legatee under the will of Luse. That Kennedy thereupon gave his note to Vliet for the amount of said legacy, payable at a future day; and that after the maturity of the note, and after the legatee had attained the age of twenty-three years, and become entitled to receive his legacy, Kennedy, under the advice of counsel, paid the said note, and thereby, as he insists, satisfied and discharged all claim that the legatee, or any one claiming through or under him, can have to the legacy.

The executors deny all notice, knowledge, intimation, or suspicion, prior to the 8th of March, 1862, of the assignment of the legacy by Vandyke to Parke, the petitioner, or to any other person, and insist, that having paid the legacy in good faith, and without notice of the claim of the petitioner, they cannot be called upon to pay the legacy a second time.

The petitioner established before the Orphans Court a clear and unquestionable title to the legacy. He showed the existence of the legacy, its transfer from the legatee by a valid assignment, a sufficiency of assets in the hands of the execu-

Executors of Luse v. Parke.

tors to satisfy it, and the tender of a refunding bond. defense is, that the legacy was subsequently assigned by the egatee to a third party, to whom it was paid in good faith/ by the executors, without notice of the previous assignment, The defense is based on the idea, that the legacy, like any other chose in action, is not assignable at law, that a mere equitable interest passed by the assignment, the legal title remaining in the assignor, and that the money having been paid by the executors to the second assignee, without notice of the first assignment, they cannot be prejudiced by the secret equity of the first assignee. But the title to the legacy is not a common law right. It was held by the Chancellor, in King v. Ex'rs of Berry, 2 Green's Ch. R. 54, that a claim to a legacy is essentially an equitable, not a legal claim, and that the assignment must pass the whole right of the assignor; that there does not remain in the assignor, ifter the assignment of a legacy, a distinct, subsisting right, apable of being assigned, but that the entire interest passes. Becognizing this principle, it is difficult to perceive how any nterest whatever, legal or equitable, could have passed by the second assignment, or how the payment of the legacy to a party having neither a legal nor an equitable title to it, an constitute a good defense to the action. It would seem that if the executors have any defense upon this ground, it s purely an equitable defense, and available only in a Court of Equity.

But, admitting the validity of the defense set up by the answer, it is not sustained by the evidence. The money was not paid by the executors without notice of the previous equity of Parke. The answer alleges that the executors had no notice, knowledge, or suspicion of the assignment to Parke till after the 12th of March, 1861, and that they paid the legacy in good faith. But it is not denied that they had full notice of Parke's claim before the legacy was payable, and before it was actually paid. True, Kennedy had given his note to Vliet for the alleged value of the legacy, payable when the legacy fell due. But the note was not negotiable.

1

Executors of Luse v. Parke.

It remained in the hands of the payee till after its maturity, when it was taken up and paid by Kennedy, one of the executors, with full knowledge of the existence of the claim of the first assignee.

The defense is by no means strengthened by the allegations of the answer, that Kennedy, one of the executors, had become the owner of the claim of Vliet. On the contrary, this part of the answer is manifestly based upon erroneous pretences, and casts a shade of suspicion over the entire de-Kennedy alleges, that as the legacy to Vandyke was payable only upon the contingency of the legatee's attaining the age of twenty-three years, he hesitated about paying the money to Vliet, and for the purpose of assuring Kennedy, an assignment and transfer of Vliet's interest was made to him, and that he still hesitated to pay the amount of the legacy. For the purpose of giving Kennedy greater assurance, Vliet procured and tendered to him a deed of release from Vandyke for the legacy. Now, it is obvious, that if the legacy to Vandyke had failed, by his death before attaining the age of twenty-three years, neither his release of his legacy, nor the assignment of Vliet's claim to Kennedy, could have given any assurance of his safety in paying the legacy. Nor were they given to obtain an immediate payment of the money, for, in point of fact, the money was not paid till after the legacy fell due. Kennedy gave his note for the money, dated on the 2d of February, three days before the date of the release from Vandyke, but not negotiable, and payable, as has been said, after the legacy became due. It was, in fact, not paid until after its maturity, and after the legatee had attained the age of twenty-three years. It was paid voluntarily, with full knowledge of the rights of the first assignee. The giving of the note was no payment of the money. Under the circumstances, the note was obviously without consideration, and void in the hands of the payee. Neither Vliet nor Kennedy were in a position to enforce the payment of the legacy against the executors. The money, if paid at all by the executors, was paid in fraud of the rights

1

Executors of Egerton v. Egerton.

of the petitioner, and constitutes no defense against his claim for the legacy.

There is nothing in the objection that Parke being present by his attorney, at the time of the assignment to Vliet, is answerable for a constructive fraud in concealing his prior right, and is, therefore, estopped from enforcing his claim to the prejudice of the second assignee. A principal is doubtless answerable for the concealments as well as the fraudulent representations of his principal in the conduct of a transaction in which he is employed to act for his princi-But Voorhees was, in no sense, the attorney or agent of Parke in the transaction alleged to be fraudulent. was employed by Parke to collect the legacy. doing so, he basely betrayed his client's interest by procuring from the legatee an assignment to a third party. is strong reason to believe that he was acting in that transaction, as the attorney of Vliet. Vliet, himself, swears that he employed Voorhees as his attorney in the matter, a week or two before the 2d of February, 1861. The assignment of the legacy to him bears date only four days before. whether he was acting as the attorney of Vliet or of Vandyke, or solely at the instigation of his own selfish instinct and love of gain, is immaterial. It is clear that he was not the attorney of Parke, and he cannot be held constructively liable for the fraud.

The decree of the Orphans Court must be affirmed, with costs.

Executors of Matthew L. Egerton, appellants, and James Egerton, respondent.

^{1.} To constitute a donatio mortis causa, there must not only be a clear intention to give, but an actual delivery at the time of the alleged gift.

^{2.} The giving of one's promissory note or acceptance by the donor to the dones, will not constitute a donatio mortis causa. It is otherwise with

the gift of a note, acceptance, or bond of a third party, which may pass by endorsement or delivery.

- 3. An exception to a charge allowed by the Orphans Court not sustained, where, in the opinion of this Court, an allowance of a part of the sum was warranted, but the preponderance of the evidence is not so decisive as to require a modification of the decree.
- 4. An oath made by a party to a claim against an estate, upon the statement of the executor that he would pay it if the claimant swore to it, is voluntary and worthless.
- 5. An executor will not be allowed a charge against the estate, for services rendered in the lifetime of the testator, where the services rendered by the parties were mutually beneficial, and it is apparent that no pecuniary remuneration was expected or intended.
- 6. It is the duty of an executor, not only to exhibit his account for allowance, but to use diligence in bringing it to a final settlement.
- 7. Decree of the Orphans Court charging the executors, individually, with the costs of suit, where they have permitted great and unwarrantable delay in the final settlement of their account, approved.

Mr. Leupp, for appellants.

Mr. Schenck, for respondent.

THE ORDINARY. This case comes before the court upon an appeal from a decree of the Orphans Court of the county of Middlesex, upon exceptions filed to the account of the executors as reported for settlement and allowance. The first ground of appeal is, that the court below sustained an exception to the following item in the account, viz. "Cash paid Eliza S. Egerton, \$800."

The charge is attempted to be supported on the ground that it was a donation mortis causa. The evidence in support of the claim is, that the testator was the owner of eighty shares in the City Bank of Newark, which, by his will, he had bequeathed to his wife. On the 7th of November, 1859, the directors of the bank resolved to increase its capital stock \$50,000, giving to its old stockholders the privilege of subscribing for the new stock, in proportion to the amount of stock held by them respectively. They ordered books of

subscription to be opened on the first of December, and required the subscription to be paid in full by the 5th of January, 1860. The testator was entitled, by virtue of the stock held by him, to subscribe for sixteen additional shares by the payment of \$800, the par value of the stock. testator in his lifetime requested Goyn D. McCoy, then his agent for the transaction of his business, and who is also one of the executors, to subscribe for the additional shares to which he was entitled, for the benefit of his wife. subscribed and paid for, they were to be Mrs. Egerton's. He told McCoy that he wished him to take the stock for the benefit of his wife, in her name, and collect the money and pay for it. This was on the 10th or 11th of November, 1859. The stock was afterwards subscribed for in the name of the testator, but the price was not paid, nor was the scrip issued, till after the testator's death. It was then paid out of the funds of the estate by the executor, and by his orders the scrip was issued in the name of the wife.

To constitute a donatio mortis causa, there must not only be a clear intention to give, but an executed gift. "Gifts of chattels personal, are the act of transferring the right and the possession of them; whereby one man renounces and another man immediately acquires, all title and interest therein; which may be done either in writing, or by word of mouth, attested by sufficient evidence, of which the delivery of possession is the strongest and most essential." 2 Bl. Com. 441. This definition of a gift inter vivos, is equally applicable to a donatio mortis causa. There must be a subject capable of passing by delivery, and an actual delivery at the time of the alleged gift. Ward v. Turner, 2 Vesey, sen., 431; 2 Kent's Com. 445; 1 Story's Eq. Jur., § 607 a, c; Roberts v. Wills, Spencer 597; Parish v. Stone, 14 Pick. 203; 1 Williams on Ex'rs 651-4.

The evidence does not bring the present case within the principle. The gift must have been either of the stock, or of the money to purchase the stock. It was clearly not a gift of the stock, for the testator never owned it. The stock was

not paid for, nor was the scrip issued, in the lifetime of the testator. Nor was it a gift of the money. Not one dollar was delivered by the testator to his wife. The money was collected, and the stock paid for by the executor out of the estate, after the testator's death. It so appears on the face of the account. The charge is for "cash paid by the executor to Mrs. Egerton."

Now, if it had been a donation by the testator morticausa, the right of the donee would have been absolute upon the donor's death, subject only to the rights of creditors. The money would have formed no part of the estate. It would not have been the subject of ecclesiastical jurisdiction, nor have formed a component part of the executor's account. The donee would have taken not through, but paramount to the executor. Nicholas v. Adams, 2 Wharton 22.

It is clear that, at the time of this alleged gift, there was and could have been no delivery. The subject matter was not capable of passing by delivery. All that the husband could claim at the time of the pretended gift, was the mere privilege of subscribing for the stock. And after the subscription had been made, all that he had was the right of having the stock issued upon the payment of the par value. Giving full credence to the evidence, it proves nothing more than an intention on the part of the husband that the wife should have the benefic of his privilege of subscribing for the stock of the bank. If he had entered into an express contract with her that she should have the advantage of the contract, it would, as a contract inter vivos, have been null and void. Nor could it operate as a donatio mortis cause Even the giving of his own promissory note, or acceptance, by the donor to the donee, it is well settled will not constitute a donatio mortis causa. It is not the gift of a chattel, but & mere contract to pay. It is otherwise with the gift of a note, acceptance, or bond of a third party, which may pass by endorsement or delivery. Holiday v. Atkinson, 5 Barn. \$ Cress. 501; Raymond v. Schlick, 10 Conn. 484; Parish v. Stone, 14 Pick. 203; Harris v. Clark, 2 Barb. S. C. R. 94;

! C., 3 Comstock 93. The court were clearly right in sustainng this exception and rejecting the claim of the executors. The second ground of appeal is, that the court sustained n exception to a charge of \$200 for cash paid Andrew T. underson. The bill rendered was for services of Anderson nd wife from July 2d to December 23d, 1859, and was paid y one of the executors. Anderson was a brother of Mrs. gerton. He went with his wife to the house of the testator 1 July on a visit, but, at the desire of the testator, remained ill his death. The evidence as to the value of their services. r whether they were rendered for hire, or as mere offices of riendship, is conflicting. Clothing and dresses are proved o have been purchased in the testator's name and given to Inderson and wife, to the value of about \$50, which, accordng to the testimony of several of the witnesses, was more han their services were worth. The proof would, in my pinion, have warranted an allowance of at least a part of his charge, but the preponderance of the evidence is not so ecisive as to require a modification of the decree. The fact hat a bill has been paid by the executor affords, under ordiary circumstances, a fair presumption of its justice and ropriety. As the legal representative of the estate, he is uthorized to pay all just claims against it. And while he cts within the line of his duty and in good faith, every fair resumption is to be made in his favor. He is, however, but trustee for others, and may not sacrifice their rights with mpunity. If he pays groundless or illegal claims upon the state, he must bear the loss. If he pays disputed claims, specially after being warned, he acts at his peril. aith and a regard for the interest of the estate must characerize all his measures. In this case, the interest of the wife of the testator, who was the legatee of the great bulk of the state, was in direct conflict with the interest of the residuary egatee, who alone is interested in this controversy. There s a manifest disposition on the part of the executor, by whom his claim was paid, to favor claims against the estate. xecutor knew that this claim arose under circumstances

which rendered its propriety, to say the least, doubtful. After it was presented for payment, he was warned by the residuary legatee that the claim was unreasonable and unjust, and was requested not to pay it. He persisted in doing so, assigning as a reason, not that the claim was just or legal, but that he would pay the bill if the claimants swore to it. An oath under the circumstances was voluntary and worthless. The conduct of the executor was a mere submission of the question to the conscience of the creditor. It was moreover an actual depriving the beneficial owner of the estate, of a trial by jury. The features of the case are strongly marked, and had all the facts disclosed by the evidence been presented to a court of equity for relief, it would have justified the interference of the court with the action of the executors in more respects than one, on the ground of constructive fraud.

The exception to the charge made by one of the executors of \$1150, for services rendered by him in the lifetime of the testator, was properly sustained. The executor was a man of business, and was long in habits of intimate friendly and business relations with the testator. No book account is produced, no charge for the services appears to have been made, nor is there the least intimation in the evidence, that in the testator's lifetime it was expected or intended that such charge would be made. On the contrary, the executor repeatedly declared that he should make no charge, and on one occasion, after the death of the testator, said, as he himself admits, that he would be the most ungrateful of mortals to do so. The services rendered by the parties to each other appear to have been mutually beneficial, and it is apparent that no pecuniary remuneration was expected or intended The charge in the account was, in fact, an after thought. was not made when the account was originally filed, but was added after exceptions had been taken to the account.

The court were right in charging the executors, individually, with all the costs of the suit. The evidence in the cause and the whole history of the case, creates the belief that most of

the difficulty in the case has been occasioned by the conduct of one of the executors. And since the filing of the account, with a large amount of funds in their hands, they have permitted great and unwarrantable delay to occur in the final settlement. It is a mistaken idea that executors have acquitted themselves of their duty by filing their account in the Orphans Court, and then permitting it to slumber, or to draw its slow length through the courts till all the law's delays are exhausted, or till they are goaded to action by the order of It is clearly their duty, not only to exhibit their account for allowance, but to use diligence in bringing it to a final settlement. They are often trustees for widows and minors, or absent persons and others, whose rights are un-It is an unjustifiable abuse of their trust to represented. make the law's delays a pretext for holding the funds of the estate in their hands, often for their own benefit and greatly to the prejudice of those interested. I think the decision of the court in this regard eminently just as well as lawful, and calculated to effect a salutary check upon a prevalent and gross abuse.

The decree of the Orphans Court is affirmed, with costs.

FEBRUARY TERM, 1865.

EDWIN M. LEWIS, administrator of James Normand, appellant, and ELIZA GROGNARD, respondent.

- 1. In strictness, the grant of administration operates only within the jurisdiction where it is granted. It gives no legal right to collect debts, or recover the possession of property elsewhere.
- 2. Where letters of administration are granted in different jurisdictions, the inventory of each administrator regularly includes only the property within the jurisdiction where his letters are granted, and for that property

only he is accountable. Each administrator must account for the property in his hands, before the tribunal of the state from which his authority emanates.

- 3. Where administration has been granted in the place of the domicil of the intestate, and ancillary administration elsewhere for the purpose of collecting debts, if the fund in the hands of the foreign administrator is needed for the purposes of due administration in the place of the domicil, the mode of reaching it would be to require its transmission or distribution, after all claims against the foreign administration had been ascertained or settled.
- 4. The distribution of an intestate's property must be regulated by the law of his domicil. But by what tribunal that distribution shall be made, depends upon circumstances, and rests in the sound discretion of the tribunal before which the account of the foreign administrator is brought for settlement. Where parties interested in the distribution reside in the state where foreign administration is granted, the fund will be retained and distributed there.
- 5. An administrator, by virtue of a grant of administration in this state, the place of the intestate's domicil, who has also sued out letters of administration upon the intestate's property lying in a foreign state, is required to file here, an inventory of such property only as he is authorized to administer here; and for that alone will he be required to give security.

Mr. A. O. Zabriskie, for appellant.

Mr. Boyd and Mr. Ransom, for respondent.

The Ordinary. James Normand, the intestate, died at Jersey City in February, 1863, leaving personal property to the value of \$40,000. For several years prior to, and at the time of his death, he resided in Hudson county, where he died. The bulk of his property consisted of bank stocks and other funds, in the state of Pennsylvania. The personal property, in this state, amounted to about \$300, and consisted mainly of a deposit of \$253, in the Bank of Jersey City. The securities and evidences of indebtedness belonging to the estate were in the hands of Edwin M. Lewis, of Philadelphia. In April, 1863, administration upon the estate was granted to Lewis, both in this state and in Pennsylvania. The inventory in Pennsylvania included the property, the situs of which was in that state. The inventory in this

state included, or was intended to include, the property here. Security was given in each state for the property included in the inventory filed within the respective jurisdictions.

On the 26th of November, 1864, the Orphans Court of the county of Hudson, by a decree, ordered that the administrator file an inventory of the whole estate of the intestate, and give security in the whole amount of the property, or that the letters of administration be revoked. From this decree the administrator has appealed.

The decree is based on the assumption that the inventory filed in this state should have included all the property of the intestate, wherever situate. It is usual, in practice, for the administrator in the place of the intestate's domicil, to include in his inventory, all the property of the intestate, the securities for which come to his hands. Though the property is situate in other states, the debts may be collected and the estate settled by voluntary transfer of the property to the hands of the administrator, without the necessity of taking out letters of administration elsewhere. But in strictness, the grant of administration operates only within the jurisdiction where it is granted. It gives no legal right to collect debts, or recover the possession of property elsewhere. Hence, it frequently become necessary to sue out letters of administration in other states, where the property may be situate, or debts may be owing. In such case, the inventory of each administrator regularly includes only the property within the jurisdiction where his letters are granted. this property only he is accountable. Each administrator accounts for the property in his hands, before the tribunals of the state or sovereignty from which his authority ema-Vaughan v. Northup, 15 Peters 1; 2 Kent's Com. 431; Story's Conf. of Laws, § 513. The subject was considered in Moore's Adm'r v. Moore, 2 McCarter 97, and I refer to the views expressed in that case, and the authorities there cited.

Where administration has been granted in the place of the domicil of the intestate, and ancillary administration

elsewhere for the purpose of collecting debts, if the fund in the hands of the foreign administrator is needed for the purposes of due administration in the place of the domicil, the mode of reaching it would be to require its transmission or distribution after all claims against the foreign administration had been ascertained and settled. Story on Conf. of Laws, § 518; 2 Williams on Ex'rs 1415.

The distribution of the fund must be regulated by the law of the domicil of the intestate. But whether that distribution shall be made by the tribunals of the several states by which the letters are granted, or whether the balance for distribution shall be transmitted by the foreign administrator to the place of the domicil, to be there distributed, depends upon circumstances, and rests in the sound discretion of the tribunal before which the account of the foreign administrator is brought for settlement. Where parties interested in the distribution reside in the state where foreign administration is granted, the fund will be retained and distributed there. Harvey v. Richards, 1 Mason 381; Isham v. Gibbons, 1 Bradford's R. 70; Parsons v. Lyman, 4 Bradford's R. 268.

In Parsons v. Lyman, the testator, at the time of his death, was domiciled in Connecticut. The will was proved, and letters testamentary were issued in that state, and also in the state of New York. Upon the settlement of his accounts by the executor in the state of New York, the court there settled the construction of the will, and directed a distribution of the fund, although a suit for that purpose was pending in the state of Connecticut.

Neither the Orphans Court, nor this court, has any right to require that the administrator shall bring the fund to which the next of kin may be entitled, from Pennsylvania to this state for distribution. In that respect, the conduct of the administrator must be controlled by the judicial tribunal of Pennsylvania. Nor can the court here anticipate what their decision may be. The claimants to the fund reside neither in this state, nor in Pennsylvania. And there

seems to be no peculiar reason why the distribution should be made by one state rather than the other, except the fact that the distribution must be made according to the laws of this state. Should the fund be transmitted to this state for distribution, it is not to be presumed that the security which has already been given for it in the state of Pennsylvania, would be lost or forfeited. Even if the Orphans Court, in its discretion, might require security for the funds not within the jurisdiction of the court, it could be only for so much as might, by the order of the court in Pennsylvania, be transmitted to this state. There can be no propriety in requiring security to be given for funds, to which the administrator, by virtue of the grant of administration in this state, has no title, for the due administration of which he has already given security in a foreign jurisdiction, and over which the tribunals of another sovereignty exercise legitimate control.

Nor can there be any propriety in requiring the administrator to file an inventory of such property. If administration in the two states had been committed to different individuals, the impropriety of requiring the administrator here to file an inventory of property beyond his control would be obvious. The principle is not altered by the fact that both administrations are committed to the same individual. The property in another jurisdiction, which he has been authorized to administer there, does not come to his hands or possession to be administered by virtue of the grant of administration in this state. They are not within the scope or meaning of the bond or affidavit required from the administrator.

The order was made, not at the instance of a creditor, but of a party claiming to be the next of kin of the intestate. It is founded upon the erroneous idea that the distribution of the fund can be legitimately made only in the place of the intestate's domicil. It extends, as its terms imply, as the evidence shows, and as the counsel of the respondent contend that it should, to all the property of the intestate, wherever situate.

The decree is clearly erroneous, and must be reversed. Having arrived at this conclusion, it is unnecessary to express any opinion as to the various formal exceptions taken to the proceedings of the court below. The decree is reversed, without costs.

WILLIAM CLARK, one of the executors of Isaac Clark, deceased, appellant, and George G. Hornbeck, respondent.*

- 1. The loss of an instrument upon which a party seeks to recover, may be proved by presumptive evidence. Proof that the paper cannot be found, due diligence having been used in searching for it, is sufficient to raise the presumption of loss, and let in evidence of its contents.
- 2. All that the law requires as a ground for the admission of secondary evidence, is a reasonable assurance that evidence of a higher nature is not withheld or suppressed by the party offering it.
- 3. A party will not be presumed, in the absence of all evidence of the fact, voluntarily to have destroyed an instrument which he was interested in preserving. As a general rule, the legal presumption arising from proof that it cannot be found, is that it is lost.
- 4. Where it does not appear whether a lost note was, or was not, negotiable, it will not be presumed to have been negotiable; or, if negotiable, that it has been endorsed in blank.
- 5. An executor will be charged in his account with the amount of a note against himself, set down in the inventory, and alleged to have been lost or destroyed by the testator in his lifetime, where the existence, amount, and loss of the note are satisfactorily proved, and where there are no circumstances sufficient to raise the presumption that the note was intentionally destroyed by the testator.

Mr. McCarter, for appellant.

The question in this case is whether there was sufficient evidence to justify the court in charging William Clark, the accounting executor, with the note in question. The case

^{*} A re-hearing was granted the appellant, after the delivery of the opinion reported here. But the Ordinary being of the same mind, after a careful consideration of the arguments upon the re-hearing, the decree of the Orphans Court was affirmed. The opinion, therefore, follows the arguments of counsel upon the re-hearing.

may be treated precisely as if William Clark were a stranger to the testator, i. e., not an executor, and the executors of deceased were sueing him for the recovery of the note in question.

As much evidence will be required to charge the executor in a controversy of this kind, as would be necessary to recover in a suit at law upon the note, in case the executors were plaintiffs, and William Clark defendant.

It is hardly necessary to premise, that in such a suit the plaintiffs would have to establish an existing liability at the time of the commencement of the suit, or be non-suit. Until that is done, the defendant cannot be called on for any defence. That the plaintiffs must show by evidence which, if uncontradicted or unexplained, would be sufficient, before defendant need make any answer, defence, or explanation. Ordinarily that is done by the plaintiff's producing the note and proving its due execution. The proof of its execution, establishes the fact that a liability then existed; the production of the note in the possession of the plaintiffs, on the trial, raises the presumption that the liabilty still exists unchanged, and throws upon the defendant the onus of discharging himself therefrom.

"The presumptions are all in favor of the holder of negotiable paper. Prima facie, the party in possession is a bona fide holder for value, and the owner of the paper; and the presumption is so strong, that though the pleadings put the title in issue, it will not be overcome by proof that the plaintiff acquired the note after due." Edwards on Prom. Notes 679, note 4; James v. Chalmers, 2 Sciden 209.

In Holme v. Karsper, 5 Binney 469, Ch. Justice Tilghman says: "In the first instance it is presumed that every man acts fairly. It lies on the defendant, therefore, to show some probable ground of suspicion, before the plaintiff is expected to do anything more than produce the note on which he founds his action."

So too, "when there is a competition of evidence upon the question whether the security has been satisfied by payment

it has been held that the possession of that security by the claimant ought to turn the scale, and entitle him to a verdict." Chitty on Bills 425. "And if, for want of distinct evidence of a payment, it should be in doubt whether it was made, the mere circumstance of the instrument not having been given up, will afford a presumption against the party who alleges he has paid it." Ibid. 394.

From these and numerous other authorities which might be cited, it abundantly appears that the possession and production of the note by the plaintiff, is the controlling circumstance upon which are founded all the presumptions necessary to show that the note remains an existing claim against the defendant. If that circumstance is wanting, all the presumptions built upon it must also be wanting.

If the plaintiff cannot prove the continued existence of the liability, by producing the note, he must prove it in some other way equally satisfactory. He is still imperatively required to prove the two requisites to a recovery. 1. The original existence of the debt or liability. 2. That it continues at the time of the suit brought.

It is perfectly manifest that evidence which may be legal and competent, and sufficient to prove the first of these two propositions, may come entirely short of proving the other. For instance, to establish the first requisite, the plaintiff must prove, 1. The existence of the note. 2. Its contents. The first may be proved by parol; the second ordinarily must be proved by the production of the instrument itself. If that cannot be done, then, in order to admit secondary evidence of the contents, "all that the law requires as a ground for the admission of secondary evidence, is a reasonable assurance that evidence of a higher character is not withheld or suppressed by the party offering it."

Greenleaf says: "The question whether the loss of the instrument is sufficiently proved to admit secondary evidence of its contents, is to be determined by the court, and not by the jury. But it seems that, in general, the party is expected to show that he has in good faith exhausted, in a rea-

sonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him. It should be recollected that the object of the proof is merely to establish a reasonable presumption of the loss of the instrument; and that this is a preliminary inquiry, addressed to the discretion of the judge." 1 Greenl. Ev., § 558.

Those requirements are all met in this case. It is perfectly manifest, that these executors have not the power to produce this note, because all parties admit that they never had it in their possession. If William Clark should be foolish enough to contradict that, the court could not, in the exercise of a sound discretion, admit secondary evidence to show what the contents of that note were when it existed. The obvious answer to his contention would be, "you admit that plaintiff cannot produce the note; your whole standing in court, and your whole defence, rests upon the supposed inability of plaintiff to produce the note. It does not lie in your mouth to deny that the reason for admitting the secondary evidence is wanting, when your whole insistment and defence rest upon the fact that they cannot produce the note. With what propriety or consistency can you, with one breath, say to the plaintiff, you cannot produce any such note against me, and with the next insist, you cannot give secondary evidence of its contents, until you have first shown that you cannot produce it?"

So far, therefore, as the question whether this is a proper case for the admission of secondary evidence of the contents of the note is concerned, the reasoning and authorities contained in the Ordinary's opinion in this case, as well as the facts of the case, and the dictates of common sense, all abundantly show that secondary evidence of the contents of the note was rightfully admitted, and that whatever facts such secondary evidence sufficiently establishes, must be taken to be true in the case.

What facts then are established by the evidence? Nothing more than that the appellant's note once existed, that its Vol. II. 20

contents were such as the secondary evidence describes, and that at the time it so existed, it was held as a subsisting liability against him by the testator. And it may as well be added here, that the testimony brings down the continued existence of that state of facts, until the time testified to by Isaac Hornbeck, viz. one or two years before testator's death.

Admitting those facts in their fullest extent, (and they have never been denied by the appellant), do they establish any thing more than the first requisite to a recovery, viz. that the appellant's liability to the testator once existed? Does the proof of those facts establish, or tend to establish, the second requisite, viz. that such liability continued until suit brought, or rather until the testator's death? (which, in this case, answers to the commencement of a suit on the note).

We contend that such second requisite remains unproved. It will not do to say, that having once established the existence of a liability, the law presumes that it continues until it is shown to have been discharged. If all the circumstances remain the same, the presumption would naturally arise. And if this note had been shown to have been in testator's possession, or among his papers, at or after his death, the rule would apply. But here the circumstances do not remain the same. The only evidence of the existence of the liability was the note. As long as the note exists, the law presumes that the fact, of which its existence was prima facie evidence, also exists.

The existence of the note is, as I have shown above, the controlling circumstance on which the presumption is founded. If that circumstance is wanting, what becomes of the presumptions founded on it? They must certainly vanish with it.

The second proposition then still remains to be proved, viz. that the indebtedness, of which the note in question was the evidence, continued until the testator's death.

The respondent cannot show it by the production of the note, or by proof of its existence up to the testator's death. He

must prove that proposition by some other evidence, or fail of a recovery.

It is not pretended by respondent's counsel, nor can I see that it is claimed in the opinion of the Ordinary, that any direct evidence of that proposition has been offered. If, then, respondent cannot offer direct evidence of the fact, he must restore or bring back the presumptions which arise out of the production of the paper, by showing that such production, in this particular case, has been prevented by circumstances which show that the liability still continues, to the same extent as if the paper had been produced.

Just here comes in the distinction which exists between the amount of proof required to lay the foundation for secondary evidence, and that required to prove our second proposition.

In the one case, the party need only show that it is not in his power to produce the paper. In the other, he must go further, and show why it is not in his power. The one is a question addressed to the sound discretion of the court, who only require to be satisfied that "evidence of a higher nature is not withheld or suppressed by the party offering" the secondary evidence. The other is a fact to be proved affirmatively to the jury, like the execution of the note, or its contents, or any other fact on which the plaintiff's action depends. On this point the jury, or the court occupying the place of a jury, has no discretion; it must be proved to their satisfaction by the weight of the evidence, or the case must fail.

If, therefore, the party relies upon the fact of the loss or accidental destruction of the paper as the ground-work on which he would base the presumption of the continued existence of the liability of which the paper was the evidence, he must show the fact of the loss or destruction of the paper affirmatively. He must show something more than his mere inability to produce, because while that inability, standing alone, may be sufficient to assure the court that he does not keep back or suppress the original, it is not sufficient to show its loss or destruction, because non constat,

but that the inability to produce the note arises from its having been paid, or from its intentional destruction by the holder, or from its having been voluntarily given up by the holder to the maker, and destroyed by him, as it is quite common for the maker of a note, having paid it or taken it up in any way, to destroy it. He has a right so to do, and to rely upon what has always been understood to be the law, that before a note can be recovered upon, the party seeking to recover must either produce the note, or prove circumstances which are equivalent to its production, something to rebut the natural presumption of payment or satisfaction, which arises from the fact that the plaintiff once had a note, and that he now cannot produce it.

The usual and regular course of business is, that when a man no longer holds a note as a claim against the maker, he gives up the possession of it to the maker. That state of things happens one hundred times, where the accidental loss of a note happens once.

If any presumption arises from such a state of facts as this, it would be, not that the note was lost or destroyed by accident, but that it was paid, or in some other way satisfied to the holder, and given up by him. The presumption would certainly be in accordance with the usual course of business, rather than in favor of an accident.

The cases cited in the opinion of the Ordinary, in support of the position that presumptive evidence of loss is sufficient, were all decided on the question as to how much proof of loss was sufficient to lay a foundation for the introduction of secondary evidence, and for that purpose they sustain the position that mere presumptive evidence of the loss is sufficient.

In Minor v. Tillotson, 7 Peters 99, the missing paper was a grant to Wade Hampton, of a tract of land in Louisiana, which, as the plaintiff claimed under W. H., became one of the evidences of his title. The point in that case, was that W. H. himself was not sworn to prove the loss, but that sec-

ondary evidence was admitted on proof of a search of his papers by plaintiff's attorney. The court held, under the circumstances of that case, that it was not necessary to swear Wade Hampton to the fact of the loss; putting their decision upon the ground that the examination made of the papers of W. H., was all that W. H. could have made himself, and that it was a very odd document and that there did not appear to be any ground for supposing that the deed was designedly withheld.

Suppose, however, that Wade Hampton himself had been the plaintiff in that suit, and the only evidence of his title had been the missing deed, would the court have permitted him to offer secondary evidence of its contents, by his merely proving that his attorney had examined his papers and could not find the deed? Would not a court require imperatively that W. H. should be sworn to prove the loss himself? If not, then the supposed necessity which has always been urged as the reason for permitting a party to be sworn in his own case for that purpose, proves to be no necessity after all. If then W. H., under those circumstances, could not have given secondary evidence of his deed, without first having sworn, himself, as to the loss, much less would he be permitted to recover on a lost note, of which he was the holder, without as stringent proof of the fact of the loss.

A deed once given vests the title, and no subsequent loss of the deed, nor its voluntary destruction by the grantee, nor its re-delivery to the grantor, nor the re-payment of the consideration money, will divest the title; that can only be divested by a conveyance sufficient to divest it. Such is not the case with a note. There the presentation of the paper is essential to the continuance of the liability; its voluntary destruction by the holder, or the receipt of the money for which it was given, or the voluntary giving it up to the maker by the holder, terminates the liability of the maker.

Once prove that a deed existed and conveyed the title, and you are not bound to produce it to show a continuance of the title. The title continues by virtue of the deed until it is

conveyed again, no matter what becomes of the paper which is the evidence of the title. Inasmuch, therefore, as the same inducement does not exist for the preservation of a deed, that does for the preservation of a note, the presumption of its accidental loss or destruction would be raised on much less evidence than in case of a note.

The case of Caufman v. Congregation of Cedar Spring, 6 Binney, p. 59, was also a question of the admissibility of secondary evidence. The court premised in that case, that "to make way for such evidence," the loss of the paper "may be proved by circumstantial evidence."

The objection there was, that the party in whose custody the paper ought to be, and who assisted in the search for it, was not sworn. The missing paper in that case was an article of agreement, under which the holder claimed no rights, but of which he was a mere depositary. Ch. J. Tilghman says, in that case, "if this writing had been in the custody of the plaintiffs themselves, it might have been reasonable to hold them to very strict proof of its loss or destruction. But considering that it was no more in their hands, than in those of the opposite party, I am not disposed to differ from the opinion of the court of Common Pleas." He also based his opinion of the legality of the admission of the secondary evidence in that case, in part upon the fact that Sanderson was a competent witness for the defendant, and if he suspected collusion or a suppression of the paper, he had a right to examine him on oath.

In the case of *Taunton Bank* v. *Richardson*, 5 *Pick*. 436, the missing paper was a letter, by which it was insisted the defendants had waived notice and demand, on the maturity of a note.

The court in that case, held, what is not denied here, that in order to lay the foundation for secondary evidence, it is not necessary to prove the "absolute irrecoverable loss of the paper itself, by fire or some other destructive agent." They

hold that the fact of the loss may be proved by presumptive evidence, "like any other fact." In that case, the secondary evidence was held to have been improperly admitted.

The question here, is not whether the fact of the loss may or may not be proved by presumptive evidence. Admitting for the sake of the argument that it may, the question still recurs, does the evidence that a note once held by a deceased person cannot, after a lapse of a year or two, be found among testator's papers by his executors, raise any presumption whatever of the accidental loss of the paper, in preference to the presumption that it had been paid or otherwise satisfied, or voluntarily given up to the maker by the holder?

In Jackson v. Neely, 10 Johns. R. 374, the missing paper was a power of attorney, under which a deed had been executed. In that case, the party to whom the power had been executed, and in whose custody it should have been, testified that he could not find it, and that he had no doubt he had destroyed it as a paper of no value.

The deed executed in pursuance of it had long been recorded, and the power was vested in the deed. Under these circumstances, the court very properly held, that there was sufficient evidence to raise a presumption of loss, so as to justify the admission of the secondary evidence.

In Turnipseed v. Hawkins, 1 McCord 272, the paper was a deed, which also had long been on record, and no one was disputing the title under it, and it was very doubtful, under the South Carolina statute, whether the copy of the record was not primary evidence, without any proof of the loss.

It will be observed that in all these cases, the question was as to the admissibility of secondary evidence, and that in none of them was the instrument the foundation of the action, nor was the instrument of such a character that its non-production deprived the party of any right, or of the benefit of

any presumption arising from the production of the paper. In all the cases the question was an incidental one, addressed to the court, and not to the jury.

Greenleaf, § 558, above cited, says, that in such cases "the object of the proof is merely to establish a reasonable presumption of the loss of the instrument," which is a very different thing from proving the loss, as one of the steps in the cause without which the plaintiff must fail in his action.

After a most diligent and careful search of the authorities, I have been unable to find a single case where, in an action by executors to recover on a lost note, the mere fact that the note could not be found among testator's papers after his death, was any evidence of its loss, when there was no proof of the note having had any existence for more than a year before testator's death. That hiatus in the history of the paper, must in some way be supplied.

Suppose Isaac Clark were living, and suing on the note, and he should prove that he held such a note some one or two years before he brought the suit, and then should prove by a witness that he (the witness) had examined plaintiff's papers, and could not find the note, would the court be satisfied with such evidence? Would it not be required of him to swear that he had lost it? Much less would he be allowed to recover on the note, unless he satisfied the jury of something more than the mere fact that on a search among his papers it was not there.

If, then, Isaac Clark were here himself, and would not be permitted to recover on such proof, how can the executors recover? Can they, or ought they to recover in the action, on less proof than that which would have entitled the testator to recover, if living? I know it may be said that the adoption of the rule contended for by me, would make it difficult, if not impossible, for an executor to recover on a lost note. Grant that to be so, for the sake of the argument, and does it justify a court in changing well established rules of law, or in inventing new ones, to save executors from the

consequences of the negligence, carelessness, or improvidence of their testators?

The death of a man always places his executors in a worse position to conduct a litigation about the estate, than the man himself would have been if he had lived; but was that circumstance ever before urged as a reason why executors are permitted to prove facts by evidence which would not be sufficient to maintain the action or defence if the man were alive?

Where is the authority for the doctrine, that because it is not so easy for an executor to prove a fact necessary to an action or defence, as it would have been for the testator, that, therefore, less proof is required; or that because it is impossible for an executor to prove an indispensable fact, therefore it will be presumed, and he need not prove it at all.

It is always one of the unfortunate incidents attending a man's death, that if a controversy arises about his estate, the executors are ignorant of important facts, a knowledge of which would have settled the controversy in favor of the estate, and the evidence of which could easily have been found by the testator; but I never heard it urged, that for that reason any less proof was required of the fact to be proved by the executors.

Suppose an executor was sued for a book account debt of his testator. If the testator were living, he might be able to produce a receipt for it, or a witness who was present when it was paid, of which fact the executor may be entirely ignorant. And yet the executor who sets up payment, is not absolved from the necessity of proving it to the satisfaction of a jury, by the difficulties which surround him. Was it ever argued, that because it is difficult to prove payment, therefore less proof is required than otherwise; or that in such case, anything which would come short of proving the issue on his part would suffice? If that were so, it is easy to see that a man's estate is placed in a better position by his death, and that suits or defences, which the man himself could not have maintained if living, can easily be supported

by his executor after his death, which would be absurd. The establishment of such a rule would offer a premium to carelessness, and would encourage men to postpone the settlement of all their important business until after their death, in the hope that presumptions would be raised in favor of their executors, which could not be invoked for themselves if living.

If, in this case, there was any evidence to warrant the presumption of loss, there might be a greater show of plausibility for the doctrine. If there was the slightest proof that Isaac Clark ever searched for the note, or complained of having lost it, or after the time when the note was last seen, ever claimed that William owed him anything on account of it, there might be some argument made in favor of the presumption of its loss, but not a syllable of such testimony is produced.

On the contrary, it is abundantly proved, that after the note was last seen, the testator executed to William a bond and mortgage for a debt of \$800, owing on the purchase of Benjamin's farm, without claiming any off-set or allowance for the debt now in controversy, which he would hardly have done, had he then held a note against William for more than the sum for which he gave a mortgage. If he had held such a note, would he have urged James Clark to take the farm and pay the debt to William, when he held in his own hands a note that would have more than paid it?

If, as is truly stated in the opinion of the Ordinary, as between the executors of a father and a son, slight circumstances are sufficient to raise the presumption of the intentional destruction of the note, are not the circumstances above adverted to, and some of which are undisputed, amply sufficient for that purpose?

Nor is the executor without a remedy in a case of this character. He can file a bill for discovery against his co-executor, and prove by him, (if the fact be so,) that the liability on the note continues, notwithstanding his inability to produce it; or in this very case, he can ask the court to put the accounting executor on oath to the same point. But if he will do neither, but, on the contrary, objects to the court's

examining the executor about it, with what propriety can be ask the court to decide a case of this kind on mere presumptions, when he, at the same time, closes the door to the only direct evidence which can now be had on the question?

On the other hand, the establishment of the doctrine contended for by the respondent, would be fraught with the most dangerous consequences.

In such an event, all an executor would have to do would be to prove that his testator once (at any time within six years and six months) held a note against a defendant, and that on testator's death it was not found among his papers, and it would be sufficient, not only to let in secondary evidence of its contents, but to establish it as a debt against the defendant, unless he could prove it paid, which in most cases he would be unable to do, being deprived by the rules of law, of his own evidence.

Another consequence of the doctrine would be, that an executor, in all cases where he knew, or had reason to believe, that his testator had, within the time of limitation, held a note against an individual, would be in duty bound to put such a claim on the inventory and endeavor to collect it, and put the maker of the note to the proof of payment, thus subjecting estates to frequent lawsuits, in many cases fruitless, and in cases where they are successful, subjecting a defendant to an unjust recovery, from a failure or neglect to preserve the note which he had paid off, and which he was under no obligation to preserve.

Although the Ordinary, in granting this re-hearing, confined the discussion to the questions of law involved in the case, I cannot, with justice to the appellant or to his counsel, pass over, without notice, one question of fact which seems to be assumed in the opinion, and on which are based many of its conclusions.

I allude to the allegation in the early part of the opinion, that "it is admitted that the note has never been paid," and to the further statement near the close, that "it is shown that the appellant acknowledged, both before and after the death

of the payee, that he had given the note, that he had never paid it, and his willingness to pay it whenever produced."

That he gave the note he never denied. His counsel never intended to admit that the note has never been paid, and they have been most unfortunate, to say the least, if they have uttered anything to lead the Ordinary to that conclusion.

The only declaration William Clark is proved to have made about having paid the note, is that sworn to by Wm. Wood, in which he said that he had paid some part of it, but would not tell him how much.

He did not, however, in any conversation, admit his liability on it, nor were his alleged promises to pay it if produced, anything more than mere banters or challenges to those who accosted him about the note, based upon his own knowledge of the fact that the executors could not produce the note against him.

He always threw himself upon what he supposed was a perfect protection to him, viz. that the note could not be produced, and it amounts to nothing more than saying, it will be time enough for me to defend myself when you establish a prima facie case by the production of the note.

Mr. R. Hamilton, for respondent.

The main point of objection to the allowance of the item of \$950 against the account of Wm. Clark is, that the note given for it is not produced.

The note was given for money borrowed of his father, Isaac Clark, a number of years ago. As it was a matter between father and son, it is not probable that the note was a negotiable one; it was a mere memorandum or evidence of the debt. The real indebtedness was the money lent.

The note was shown, by the evidence of Isaac Hornbeck and David Thompson, to have been in the old man's possession to within a year of his death. As the note was long past due, and not shown to have been a negotiable one, 100 possible harm can arise to the accountant in not producing it.

But in cases where the note is the sole foundation of the

1

Clark v. Hornbeck.

suit, the plaintiff being no party to the consideration, according to the authority cited by the opposite counsel, the object of the proof (to let in secondary evidence), is merely to establish a reasonable presumption of the loss of the instrument, and this is a preliminary inquiry addressed to the discretion of the judge. 1 Greenl. Ev., § 558. There was abundant evidence given in this case, to raise such a presumption. It was a note left running a number of years; interest paid thereon occasionally.

There is no evidence in the cause, that the accountant ever pretended he had satisfied or paid off the note. After the old gentleman's death, diligent search was made among his papers for it. The accountant was one of the executors, having the custody of the papers, and present, handling the papers at the time of the examination; and against the protest of the other executors, tore up and destroyed papers, so that they could not be identified. The note could not be found, and it is put down upon the inventory as a note against the accountant, which was "lost or destroyed," and which inventory he verified by his oath.

This evidence, with other circumstances and evidence in the case, was abundant to raise the presumption of loss, and to account for its non-production.

The counsel for the accountant argues, with more ingenuity than soundness, "that the note was the only evidence of the existence of the liability, and that the liability could only continue while the note was shown to exist, and that as it was not proven to be in existence at the testator's death, the liability or indebtedness did not continue." No authority is given for this assumption, nor is any reason assigned; it is a naked proposition without support.

Why is it necessary to show the note in existence at the testator's death? Why not fix any other period as well? If the testator had lost or mislaid it in his lifetime, his executors, after his death, succeed to the same rights he had; if he could have maintained an action for the indebtedness, by establishing a reasonable presumption of its loss, so can they.

Vol. 11.

Because the first and best evidence of the indebtedness can not be produced, its absence being accounted for by evidence to establish a reasonable presumption of its loss, that does not prevent the indebtedness from being shown by secondary evidence, if it is within the power of the party to produce it.

In this case, where the indebtedness arose between the testator and accountant for money lent, and that being clearly shown, independent of the note, the only necessity for the production of the note, or of evidence accounting for its absence, was to satisfy the rule, that the best evidence which the nature of the case will admit of, must be produced; and to save the accountant from the possibility of any further claim upon it.

As before stated, the note not being shown to be negotiable, and being long past due, the accountant could sustain no injury by its non-production.

The counsel argues that the note not being produced, in order to recover upon it, its destruction, or its equivalent, must affirmatively be shown. No authority is shown for this assumption. The authority is to the contrary. 2 Parsons on Notes and Bills 290, 307; Renner v. Bank of Columbia, 9 Wheat. 581, 596.

Proof of loss is sufficient to support the action at law, on non-negotiable notes, without proof of destruction. 2 Parsons on Notes and Bills 289, 290. Presumptive evidence of the loss is sufficient. Ibid. 306. And in a note not negotiable, it is said, a court should be satisfied with slight evidence of its being mislaid. Ibid. 306.

The best evidence the nature of the case will admit of, to prove the loss, or account for its absence, is required; therefore the party holding the note, and claiming to recover upon it as a lost note, should be put upon the stand to testify. But this is not imperative; any one else who knows the facts, or in case of his death, his representatives, may make the proof. *Ibid.* 305.

The counsel argues that the non-production of the note is

esumptive evidence of its payment. Such is not the premption of the law.

"It is not necessary for a creditor to prove that a debt idenced by a lost paper is not paid. The onus probandi sts on him who alleges payment." 2 Parsons on Notes id Bills 307.

The counsel does not pretend, that it is to be presumed at a man would give away his debt or his note; that is a atter that would require affirmative proof, if set up.

In this case, the presumptions would all be against the countant, that this note had ever been given to him. There is not the remotest reason for it. He was in better cirmstances than the testator, or any of his other children, d had large claims against the testator. He resided vay from the testator, and there were no reasons for any voritism towards him, but to the contrary.

And as to any supposition of payment, it is ignored by all e evidence and facts in the case. He never pretended, so ras the evidence shows, that he ever paid it. It is put wn upon the inventory as "lost or destroyed," which he verid by his oath, without alleging or pretending payment, d subsequently said he would pay it, if produced. ought the non-production would screen him from the yment, and behind that quibble he placed himself. fact, admitted it was not paid, or what was tantaount thereto, to Mrs. Wood, his sister. And on the ocsion in Mr. Thompson's office; the circumstances attending business there, instead, as the opposing counsel argues, showing the testator had not the note at that time, proves, we contend, very strongly, that Isaac Clark then had the te there, and waited a long time in the office for William arke to return, to get a settlement of the note with him. It is true, that on that day, Isaac Clark executed a mortge, by arrangement with the commissioners who sold the em or lands of his deceased son, Benjamin, upon the lands r the purchase money, and the commissioners, in order to

ttle with the heirs of Benjamin, who were his surviving

brothers and sister, and sister's children, had a bond executed from Isaac Clark for each one's share, and among others, a bond for \$800, to William Clark; this was a formal thing, and was a matter of settlement with the commissioners.

But to show there was a settlement to be made between Isaac Clark and William, and that Isaac Clark then held the note in question against William; on that same day, in order to meet the cash payment required by the commissioners, Isaac Clark received from William Clark (the accountant) \$1700, which he claims in his account as executor, against the estate, for which he did not receive a scratch of a pen. He simply handed in the money to Mr. Thompson, for his father, without receipt, note, bond, or anything else.

Now if there was not a settlement to be made with the father, and that note to be accounted and paid out of this \$1700, why leave it in this way?

The counsel argues, why would Isaac Clark give a bond to William, if he held the note? For the best reason in the world—because it was due to William, independent of the note. The \$1700 which William that day let him have would meet the note, and more too, and may fairly be presumed as intended to be applied to the amount of the note. It is, in fact, an acknowledgment that the father had a claim to meet it.

The suggestion of the counsel for the accountant, that he should have been put upon the stand, after his rejection of his co-executor, Mr. John H. Wood, as a witness, upon the merest technicality, comes with bad grace. Mr. Wood was cognizant of all the matters between the testator and William Clark; was at Mr. Thompson's office at the time referred to, when the money was paid, and mortgage given, and then alleged, as Mr. Thompson testifies, that Isaao Clark was waiting to settle the note with William. Mr. Wood was also one of the executors, and assisted in examining the papers, and protested against the destruction William made of one or more of them at that time.

THE ORDINARY. The appellant having exhibited his final account, as one of the executors of Isaac Clark, deceased, for settlement and allowance, exceptions were filed thereto by Hornbeck, the respondent. Upon the hearing of the exceptions, the court decreed that, in addition to the sum with which the accountant charged himself, he be charged with the further sum of \$950, for a note set down in the inventory against accountant as lost or destroyed by the deceased in his lifetime, with interest on the note from the date of the inventory, amounting to \$1116.35. From this decree the accountant appealed.

That a note for \$950 was given by William Clark, the executor, to his father, the testator, is not denied. The evidence shows that the note was given several years before the testator's death, and that it was in existence until about the year 1859, or 1860. The testator died on the 27th of March, 1861. There is no evidence that it was in existence at the death of the testator, nor is it shown when, how, or by whom, it was either lost or destroyed.

The last time, so far as appears by the evidence, that the note was seen, was one or two years before the testator's death, when it was delivered with other papers by the witness to the testator, he being at the time in the company of his son, the accountant. The note is not traced to the hands of the accountant, nor is it shown that he at any time had the charge, custody, or control of his father's papers. It is admitted that the note has never been paid.

The only question is, whether the evidence before the Orphans Court was sufficient to justify the court in charging the accountant with the amount of the note.

It is urged, on the part of the appellant, that the judgment below is erroneous, inasmuch as the loss of the instrument upon which the recovery was sought, was not affirmatively proved.

The principle that the party seeking to recover upon a lost instrument must prove the loss affirmatively, is not questioned. But the rule does not require direct and positive evidence of

the fact. The loss of a paper, as well as any other matter of fact, may be proved by presumptive evidence. Proof that the paper cannot be found, due diligence having been used in searching for it, is sufficient to raise the presumption of loss, and let in evidence of its contents. Minor v. Tilloteon. 7 Peters S. C. R. 99; 1 Greenl. Ev., § 558; Taunton Bankv. Richardson, 5 Pick. 441. The party by whom the loss is suffered, or through whose agency it occurred, though a party to the record, and directly interested in the event of the suit, (independent of the statutory provision, rendering interested parties competent witnesses,) was permitted to prove the fact of the loss. But competent proof of the loss is by no means confined to such direct testimony. So narrow a limitation of the rule, would necessarily defeat a recovery in all cases where a suit was brought by executors upon a note lost by the testator in his lifetime.

If the person to whom the paper belongs, or who by law has the custody of it, or to whom it has been entrusted by another, testifies that he has made diligent search for it where it was likely to be found, it is sufficient evidence of its loss.

So, proof of the destruction of a trunk containing the papers of a deceased person, or an unsuccessful search among the papers of the deceased by the executor or person having them in possession, affords presumptive evidence of loss, and justifies the admission of secondary evidence of the contents of a missing paper. Jackson v. Neely, 10 Johns. R. 374; Caniman v. Congregation of Cedar Spring, 6 Binney 59; Turnip seed v. Hawkins, 1 McCord 272.

In Sterling v. Potts, 2 South. 776, and in The Governor v. Barkley, 4 Hawks 20, the objection was not that a search for a missing paper among the papers of a deceased party may not be satisfactory evidence of the loss, but the objection was, that the executor or administrator, who was the legal custodian of the papers, was not called.

All that the law requires, as a ground for the admission of secondary evidence, is a reasonable assurance that evidence

of a higher nature is not withheld or suppressed by the party offering it.

It is suggested that the evidence offered proves, either the loss of the note, or its destruction by the testator; and in case of voluntary destruction by the testator, secondary evidence of its contents is inadmissible. This objection presents the simple question, whether the legal presumption arising from proof that the paper cannot be found, is that the paper is lost, or that it has been intentionally destroyed? general rule, it is clear the legal presumption will be that A party will not be presumed, in the the paper is lost. absence of all evidence of the fact, voluntarily to have destroyed an instrument which he was interested in preserving. Foster v. Mackay, 7 Metcalf 537. If such were the legal presumption, no recovery could ever be had upon a lost paper, where the holder who suffered the loss was dead. sumption of the voluntary destruction of the instrument would exclude all secondary evidence of its contents. Broadwell v. Stiles, 3 Halst. R. 58; Vanauken v. Hornbeck, 2 Green's R. 182; Wyckoff v. Wyckoff, 1 C. E. Green 401.

Where, as in the present case, the suit is brought by the executor of a father against a child, to recover upon a note alleged to be lost, slight circumstances would be sufficient to raise the presumption that the note was intentionally destroyed by the father to relieve the son from liability, in order to effect a distribution of the testator's estate among his children, in accordance with his wishes. But there is not the slightest circumstance in the evidence to give countenance to such a conclusion.

It is objected that the note may have been negotiated, and the court should have required that the appellant be indemnified against all further liability upon the note, before requiring him to pay it.

But there is no evidence that the note was negotiable. Where it does not appear whether a lost note was, or was not, negotiable, the court will not presume it to have been negotiable; or, if negotiable, that it has been endorsed in blank.

Pintard v. Tackington, 10 Johns. R. 104; McNair v. Gibert, 3 Wend. 344; Edwards on Bills 302; 2 Parsons on Notes 200.

The note is shown to have been in the hands of the payer. long after its maturity, and after a payment had been made upon it.

The existence, amount, and loss of the note, are satisfactorily proved. It is shown that the appellant acknowledged, both before and after the death of the payee, that he had given the note, that he had never paid it, and his willingness to pay it, whenever produced. I see no just ground upon which his refusal to pay it can be based. The mere fact that its precise date and terms are not proved, is not material. He is charged with interest only from the date of the inventory.

The costs were properly charged against the estate in the hands of the appellant. The burden does not fall upon him alone, but upon all the parties interested in the estate.

The decree is affirmed with costs.

CASES ADJUDGED

IN THE

COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY,

ON APPEAL FROM THE COURT OF CHANCERY.

MARCH TERM, 1864.

EMILE C. BERCKMANS, appellant, and SARA E. BERCKMANS, respondent.

Upon a bill for divorce on the ground of adultery, the complainant must not only show a decided preponderance of evidence in support of the charge, but must prove it to the satisfaction of the court, beyond a reasonable doubt.

This case came before the court upon an appeal from a decree, made in accordance with an opinion of the Chancellor, reported in 1 C. E. Green 122.

Mr. Williamson, Mr. Zabriskie, and Mr. Frelinghuysen, Attorney General, for appellant.

Mr. Titsworth and Mr. C. Parker, for respondent.

The opinion of the court was delivered by

VAN DYKE, J. The issue presented in this case is neither a novel, nor a complicated one. It is confined to a single point. It is a single fact, clearly and explicitly alleged on the one side, and as positively and explicitly denied on the other. The complainant asks a divorce from his wife, and gives for it the single reason that she has been guilty of adultery with Dr. Titsworth. This allegation of adultery, as we have seen, is positively denied, and whether the charge thus made be true or not, is the question for us to determine, and although the evidence is quite voluminous, and seems to touch on many subjects, yet it must all bear upon and tend to elucidate the issue thus formed, or it has no proper place in the matter before us.

The charge made by the complainant, if true, is known to our law as a crime; consequently this prosecution partakes strongly of the nature of a criminal proceeding, so much so as to place the complainant under the necessity, not only of placing a decided preponderance of testimony in favor of the charge, but of proving it to the satisfaction of this court, beyond a reasonable doubt. I do not mean to say that it must be done by such an amount of overwhelming and unmistakable evidence as to render it impossible to be otherwise, but the evidence must be such as to satisfy the human mind, and leave the careful and guarded judgment of the court, free from any conscientious and perplexing doubts as to whether the charge be proved or not. If, after a careful examination of all the competent testimony, such doubts remain immovable, it is clearly our duty to give the defendant the benefit of such doubts, and to refuse the prayer of the complainant.

The evidence presents the aspect of being both positive and circumstantial. That which may be termed positive is brief, but very direct. It is confined to what may be termed the parlor scene, and the bed-room scene, and if the evidence of Mrs. Maria Eliza Berckmans, the witness who describes these scenes, as given in her examination in chief, is to be taken as exactly true, then we are under the legal ne-

essity of decreeing in favor of this complainant, for if the natters and things there described by her are conceded be true, we are bound to consider the charge as proved eyond all reasonable doubt. But this testimony of Mrs. terckmans is seriously affected by two considerations. First, er testimony is in favor of the complainant, and it stands, o far as these scenes are concerned, alone and uncorrobrated, while she is expressly and positively contradicted, rith regard to each of them, by two witnesses, Sara Bercknans and Dr. Titsworth. These two witnesses may be unruthful as to what they say, but they cannot be mistaken They certainly do know whether the scenes debout it. cribed are true or not. Mrs. Berckmans, the elder, may be intruthful, and she may also be mistaken. If the evidence of he three be entitled to an equal amount of credit and confilence, then the evidence of the defence has entirely overhrown, by its positiveness and preponderance, that of the omplainant. It is true that these witnesses on the part of the lefence, have a strong inducement to swear as they do, but is not this also true with regard to Mrs. Berckmans? We have 10 rule by which to determine what motive or consideration vill most certainly induce a person to perjure him or herself. One might be tempted to do it for a mere money consideation; another, who could not be purchased by money, might lo it to save his name and reputation from the charge of disionor or crime; and another, who might care but little for ither of these, might do it to gratify a most malignant and inatiable feeling of revenge, or of implacable and unrelenting ate, and I do not see but what either of these motives might e as effectual in inducing a witness to depart from the truth s any of the others, and judging from all the developments nd manifestations to be found in the evidence in the case, hardly feel at liberty to say that the defendant and Dr. litsworth had stronger inducements to depart from the truth han Mrs. Berckmans herself. And, entirely aside from this ontroversy and every thing connected with it, I do not

know but what their characters for truth and veracity are as good as hers.

Nor can I admit that the mere charge of crime is so far to destroy the credit and character of a person, as that he is not entitled to credit when speaking under oath. Such a principle might ruin the most exemplary of the earth. Surely if the charge is not true, it ought not to discredit the party, and to permit it to do so is to assume that the charge is true, which we cannot do, that being the very thing in dispute.

I think, therefore, that this direct and positive testimony of Mrs. Berckmans, if not entirely overthrown by a preponderance of conflicting testimony, is so much shaken and thrown in doubt, as to be wholly unreliable in so grave a matter.

There is still another difficulty with the evidence of Mrs. Berckmans. What seemed so direct and definite in her examination in chief, so far as the parlor scence is concerned, is by her cross-examination reduced to the greatest doubt and uncertainty. She does not pretend to have seen the defendant at all on the sofa; she saw only a part of her dress; but whether the defendant was in the dress, or in the room at all, or whether one of her dresses happened to be lying on the sofa, or over one corner of it, does not appear; nor does she claim to have recognized Dr. Titsworth at all, or the garments or form of any person, either male or female, but only his boots, his feet, as she says, lying on the sofa, but whether the feet were male or female feet, or whether the boots, if such they were, were on the feet of any one, or lying loose on the sofa, if there at all, all these things are rendered more than doubtful. She does not seem to have seen the doctor go away, and had no knowledge of his being there at the time, except that she saw him come there some hours before. If we add to this sofa occurrence the evidence of others, it is rendered still more doubtful whether she could by possibility have seen anything on the sofa at all.

The whole of the evidence then, which relates to these two principal transactions, having become so reduced, contra-

dicted, and rendered improbable and unreliable, it becomes proper to inquire whether there is any thing in the circumstantial evidence in the case which is sufficient, in itself, or so corroborative of what is considered the direct evidence, as to justify us in sustaining this complaint. Looking at these circumstances as they are detailed by the complainant's witnesses alone, I should be strongly inclined to think, that if the things said to have been done by Dr. Titsworth, had been done by almost any stranger, not a physician, they would be inconsistent with innocence, but being the acts of a family physician, who had long been in the habit of visiting these people in a professional capacity, in connection with the explanations which have been given of them by those who had the best opportunities of knowing, I cannot say that they are inconsistent with perfect purity of intention. I cannot say, of course, that they were not so in point of fact, but the evidence, taken altogether, is very far from convincing me that they were so.

One class of these circumstances relates to the frequency and length of the doctor's visits. Whether these visits were too frequent or not, could only be known with any certainty by the family itself, and its immediate friends. The husband and the wife, the mother of the husband, while there, and the mother of the wife, as well as the physician, had very good opportunities of judging. The husband has not said they were either too frequent or too long. The mother of the husband has been examined, and has expressed her strong dislike to the doctor's visits, whether long or short, whether frequent or otherwise. With her suspicions awakened, as she says they were, she was opposed to all his visits, and was not very likely to see much necessity for them, and was very likely to consider them much more frequent, and much more extended than there was any necessity for. The wife and the mother were also examined, as was also the physician; all of these negative the idea that these visits were either unnecessary, or uselessly prolonged. The opinions of all outside Vol. II. 2q

persons must be based mostly on conjecture, and not upon knowledge. The frequency of a physician's visits must depend very much, I imagine, on the timidity, nervousness, and inexperience of those who employ him. Some people send for the doctor at the slightest cause of alarm; others scarcely ever. The length of such visits, I suppose, would depend much on the number of the doctor's patients, and the sluggishness or activity of his habits. Some never, or seldom, sit down; others never want to get up, and can never go any where without staying all day, if any one will keep their company. The complainant, then, making no objection here to these visits, and never having complained of them to any one at home, so far as we know, but remaining on intimate terms with the doctor to the last, although his mother had long before told him enough to arouse his suspicions, taken in connection with all the evidence on the subject, seems to repel the idea that there was anything really amiss in either these visits, or the acts at the store of Mrs. Marsh, or along the streets, which some of the witnesses thought somewhat equivocal.

Another class or set of circumstances relied on by the complainant's counsel to prove the guilt of the defendant, is the supposed indecent examinations and suspicious experiments practiced by the doctor on the defendant. All the evidence on this subject is the evidence of the complainant, drawn, it is true, from the defendant's witness, not as a cross-examination on any subject previously introduced by the defendant, but as new matter. It is, therefore, the complainant's testimony, and he must take it as it is. What constitutes indecency in such matters, at this day, when so many mechanical physicians are to be found, whose attention is mainly confined to the peculiar diseases of females, is more than I can tell. Doubtless most, if not all of these practices, would be considered indecent, except when performed by a regular-bred physician, as a necessary part of the healing art. But it seems to me to be a sufficient answer to all of this, if any thing wrong was done, that it was all performed at the express

equest of the husband himself, and in his presence, he assistag as well as he could in the operations.

Then too it is said that Doctor Titsworth aided the defendnt in her flight from her husband. There does not seem o have been any difficulty in the wife's leaving. rivilege had been offered her before, and no impediment to er doing this would, I suppose, have been offered; but the lifficulty arose about the children, and it seems to have been on their account that the doctor interfered, and that a plan of escape for them, rather than for the mother, was suggested by him. His advice was reduced to writing, which he desired should be burned, and reference is made to seeing her again that evening. These things may admit of an interpretation unfavorable to the defendant. They are such as guilty parties might have adopted, but they do not necessarily require such a construction. They are such as almost every man of common humanity and ordinary sympathies would perform for what he deemed a respectable woman, who had, in his opinion, been treated with sufficient severity and wrong to justify her separation from her husband. the parties were guilty, he would be likely to aid her escape, if necessary. If they were entirely innocent, there was no one to whom she could have applied for aid with more prooriety than to Dr. Titsworth, and none that could have assisted her, under all the circumstances, more properly than Few, if any, knew her condition and sufferings, if there were any, better than he, and if he was satisfied of their existence, it is quite natural that he should have been willing to assist her, although he may have been unwilling that his letter to that effect should fall into the hands of the complainant.

This marriage has certainly been an unfortunate one. Great wrongs, or at least great mistakes, have doubtless been committed by some, perhaps all of the persons prominent in the affair, which a little more consideration, and a small amount more of conciliation, might have prevented. But I feel constrained to say that the evidence is not of that

safe, satisfactory, and reliable kind, which is necessary to justify me in condemning this woman to perpetual infamy and disgrace.

I think, therefore, that the decree of the Chancellor should be affirmed.

The decree was affirmed by the following vote:

For affirmance—Beasley, C. J., Cornelison, Elmer, Fort, Haines, Kennedy, Ogden, Van Dyke, Vrederburgh, Wales. 10.

For reversal-None.

FARRINGTON BARCALOW and wife, appellants, and DAVID SANDERSON, respondent.

- 1. While it is the duty of the court to maintain the law against unity, and carefully to prevent its evasion, it will not enforce its severe penalties, without evidence entirely satisfactory and free from doubt.
- 2. Where usury is set up as a defence to the foreclosure of a mortgage, it must be satisfactorily proved by a clear preponderance of evidence in its tayor. If the defendant swears to it himself, and the plaintiff denies it by his evidence, in the absence of other proof, there is no preponderance of evidence in defendant's favor, and the usury is not proved. Dissenting opinion of VAN DYRE, J.
- S. Where, however, the defence was, that the mortgage was usurious, by reason of the complainant's having exacted from the defendant notes, amounting to \$5100, as a bonus for a loan of \$20,000, and that the only consideration for the notes was the loan; and the complainant, in his evidence, admits the giving and receiving of the notes, and that he neither raid, nor did the defendant receive anything for the notes, but contends that the notes were given on account of another transaction, and not on account of the mortgage in question, the burthen of proof, that the notes were given and received in another transaction, is shifted to the complainant. If he admits facts which, prima facie, establish the usury, but seeks to avoid that conclusion by alleging new matter, he must establish such new matter by a clear preponderance of proof in its favor. Dissenting opinion of Van Dyke, J.

This was an appeal from an interlocutory decree of the Court of Chancery, made in a foreclosure suit, wherein the respondent to this appeal was complainant. The complainant was adjudged to be entitled to the relief prayed for in his bill, and it was referred to a master to ascertain the amount of principal and interest due to him upon his mortgage. The defendant, conceiving that usury had been clearly shown, appealed from the decree. The facts of the case sufficiently appear in the opinion of the court.

Mr. Ranney, Mr. Bradley, and Mr. Gilchrist, for appellant.

Mr. J. V. Voorhis, Mr. A. O. Zabriskie, and Mr. Williamson, for respondent.

The opinion of the court was delivered by

ELMER, J. The appellants, who were the defendants in the Court of Chancery to a common mortgage bill, have set up the defence of usury, and insist that their mortgage, dated November 18th, 1854, to secure the payment of \$20,-000, on the first day of January, 1858, with lawful interest, is for that reason void. Both parties were examined as witnesses, and as so often happens, tell entirely different stories. That the testimony of Barcalow ought not to be relied on as sufficient, of itself, to sustain his defence, is evident, not only because of the great danger of permitting a debtor to swear himself clear of a large debt, for which he has given his bond, but because in this case, it appears that after swearing in his answer to certain important statements, he reiterated them on his examination and cross-examination, in the most positive manner, and was subsequently compelled to admit that he was mistaken, and this mistake, if a mistake it was, as we may charitably believe, was in reference to transactions, it seems almost incredible that he could have forgotten.

As to the testimony of the appellant's hired man, who 2Q*

swears that he was hidden in the upper story of his office, wrapped in a buffalo skin, for the purpose of listening to a conversation between these parties through a scuttle-holeinthe ceiling, so far from being entitled to credit, in my opinion, taints the whole defence with strong suspicion.

But it is insisted for the appellants, that the statements of the complainant himself, taken in connection with the testimony of Gaston and McGraw, who are unimpeached witnesses, are sufficient to show that the transaction between the parties was, in fact, usurious, and this is the important question to be decided. That the mortgage was given to secure a loan of money is clear. The complainant held the defendant's paper, upon which there was due between six and seven thousand dollars. The latter was engaged in carrying on the lumber business at Somerville, in partnership with one Lindsley, and was desirous of purchasing out his interest in the concern, or of procuring some other person to do so, who had sufficient capital to enable him to go on with the business. It was proposed that the complainant should become the purchaser, and should make a loan to the defendant of \$20,000, which, it would seem, he agreed to do

The bond and mortgage in controversy were executed the office of Mr. Gaston, in Somerville, on Saturday, Novem ber 18th, on which day they bear date. Gaston was the attorney employed by the defendant, but acted in this bus ness for both parties. He states that the papers were leff in his office, as the parties had to go to New York to desomething connected with the business. On Monday, the 20th, they met in New York, and the manner in which the loan should be made was arranged. Notes of Barcalow him self were given, payable to the order of complainant, date-January 22d, 1854, and payable at from ten to fourteen months, for the aggregate amount of about \$11,527, which complainant endorsed, and defendant retained or made use Instead of the complainant becoming the purchaser o-Lindsley's interest in the partnership business, the defendant purchased it himself, and on the same day he made si=

sory notes to the complainant, for eight hundred and ollars each, bearing different dates, but payable, one first day of January, 1856, and the others at the exon of each succeeding six months.

s alleged by the defendant, that these notes were given onus for the loan of the \$20,000, while the complainant they were in lieu of the profits of the partnership into he expected to enter with Barcalow, and which he had ssured would, judging from the past, much exceed their its.

isley, who had conveyed to Barcalow his interest in e real estate owned by the partnership, at Somerville, 16th of November, two days before the execution of ortgage, and who made him a bill of sale for the lumber, 1 the 20th, was not examined. McGraw, who had been rtner of Barcalow in the business at one time, and ut to Lindsley, who seems to have been largely into him, and in whose office much of the negotiation lace, gives us but little precise information, and is inoccused by the counsel on both sides, of not willingly ing what he really knew. The result of his statements it Sanderson told him, as summed up by himself, is, Mr. Sanderson had talked of going into the business artner, and preferred to furnish this amount of money t him have the business himself. These notes, as I stood it, were for anticipated profits in the business." t the complainant was originally induced to make the ot only because he was the friend of Barcalow and acred to lend him money and held his paper, but also in eration of the profit he then anticipated from the busithe partnership into which it was proposed he should appears to be highly probable, and may be safely as-This, however, if he was intended to be truly a r, and that relation was not to be a mere sham to cover ious bargain, of which there is no sufficient proof, was The more important question is, did the subon of the notes make the contract usurious?

opinion it did not, if the transaction was, in fact, a bona fide

purchase by Barcalow of the complainant's right or intention to interfere with his desire of obtaining Lindsley's interest in the partnership, on terms he considered advantageous. While it is the duty of the court to maintain the law against usury, and carefully to prevent its evasion by any shift, covin, device, contrivance, or deceit, we are not called on w enforce its severe penalties, without evidence entirely satisfactory and free from doubt. The strong probability in this case is, that while Sanderson was willing to lend his money if he could participate in the profits of the lumber business, Barcalow was willing to pay him the amount of the notes, to get rid of competiton for the purchase from Lindsley, and that Sanderson preferred this arrangement. There is no satisfactory evidence that Sanderson made it a condition of the loan, that he should have these notes, or that they were necessarily connected with it. Sanderson, himself, says the notes were given to him for Lindsley's interest, and to 88sist Barcalow by way of lending him money at times, if he had any to spare. This statement, it is urged, is of itself proof of usury, inasmuch as when the notes were given, be had not advanced all the money to complete the loan f which the mortgage was given. It is clear, however, I thin that taking all he says on this subject together, which f the fair understanding of his statement we ought to do, he did not mean that the notes were in consideration of any parof the loan then agreed upon, but as an inducement for him to make future loans.

After their return from New York, the parties met agair at the office of Mr. Gaston, and the complainant signed ar agreement respecting some mortgages assigned to him as collateral securities, and an engagement to pay the notes of Barcalow, which he had endorsed in New York, as they should successively mature, and they adjusted the balance due and the interest and rebate on the several notes and debts between them, and closed the transaction. The defend ant alleges that the interest was then calculated at seven pe

cent., and that this infected the whole loan with usury. But how this calculation was made does not appear. It certainly will not do to rely upon imaginary figures on either side, especially as both parties insist upon mistakes, and cannot otherwise produce the desired result.

In my opinion, the decree of the Chancellor should be affirmed.

VAN DYKE, J., dissenting. The suit in this case is brought to foreclose a mortgage for the sum of twenty thousand dollars. The defense to it is that of usury. The amount in question is so great, and the consequences to the complainant of such magnitude, that we almost shrink from an examination of the evidence which goes to sustain this defence; and yet, in proceedings where life is at stake, we do not expect either court or jury to hesitate in reaching the conclusion to which the law and the evidence clearly point, no matter how sad the consequences may be to the party on trial. So in the case before us, where the law against usury is quite as positive as it is against murder, if the usury be proved according to the well established laws of evidence, it is our imperative duty so to decide, without any reference to the consequences which may result to the parties.

The mortgage in question is made up of different sums of money added together. Some of these were moneys due from the defendant to the complainant for money borrowed, and otherwise, previous to the making of the mortgage; some for money advanced at the time; and some for notes of the defendant endorsed by the complainant, which he was to pay, and which he did pay, at maturity.

The usury charged is of a two-fold character. First, it is alleged that on the moneys due from the defendant to the complainant, previous to the execution of the mortgage, and which formed a part of it, amounting to \$6912.71, a usurious interest of seven per cent. per annum had been reserved and paid; and secondly, that in negotiating and completing the entire loan of \$20,000, a bonus for such loan, of \$5100, was

agreed upon between the parties, to be paid by the defendant to the complainant, and that such bonus was accordingly paid. If either of these charges be true in fact, no matter in what garb the transactions may have been dressed, or how mysterious, equivocal, or cabalistic, the language may have been which was made use of, the transaction was unquestionably usurious, and the complainant should not be permitted to recover.

With regard to the first charge, it is proved, in some of its features, at least so far as language goes, by the testimony of the defendant; but it is with quite as much positiveness disproved, so far as language goes, by the complainant in his evidence; and this is all the testimony, I believe, that we have on that part of the subject. If this were the only question in the case, it should give us but little trouble. It would be settled by a well known rule of law, without going into any examination of the credibility of the witnesses or the force of their evidence. The usury is set up by the defendant, and he must prove it satisfactorily, that is to say, he must throw a clear preponderance of evidence in his favor. If he swear to it himself, and it is not contradicted or denieby the complainant, or by other evidence, or is so equivocal denied as to amount to an admission of its truth, then ther is a preponderance of evidence in favor of the defendant; bu where the defendant swears to it, and the complainant, b his evidence, denies it, there is no preponderance in the defendant's favor, and the usury is not proved, and we canno ' lawfully determine that it is. This seems to be the case in reference to the first feature in the alleged usury. proved.

In regard to the second feature of the alleged usury, viz that the complainant received a large bonus for the loan of the \$20,000, it seems to me the case is entirely different. This charge is explicitly set out in the answer. The defendant, in his evidence, swears to it, not only with positiveness-but he furnishes, in the notes given at the time, the mode and manner in which it was done, while the complainant, in

his evidence, as clearly testifies that he did, at the time of

taking the mortgage, receive the identical \$5100 mentioned by the defendant, in precisely the same way and manner as he described it. And he also admits and testifies that he never did pay or advance, and never was to pay or advance, one farthing of consideration, either in money or other property, to the defendant or any one else, for the said sum of \$5100, and that the defendant never did receive, and never was to receive, any such consideration therefor. It is true he testifies that this alleged bonus, paid originally in notes, was given in an entirely different transaction; but it does seem to me, that when the defendant, by his testimony and corroborating exhibits, has made out a clear prima facie case of the bonus paid, with the circumstances of time, place, and manner, and when the complainant admits that amount paid, at the time and place, and in the manner stated, and that they were the time and place when and where the mortgage loan was itself consummated, and that he never paid or advanced any consideration whatever for such money, but sets up that he received it upon some other transaction—it seems to me, I say, that under such circumstances, the burden of proof thereafter has changed, and rests upon the complainant. He does not in this respect deny what the defendant has said, but he admits it, and sets up a new matter, to which the defendant has not in his evidence referred. It is new matter, too, by which he must escape, if at all, for without it the case is clearly and strongly against him, and it becomes his duty to establish it by placing a preponderance of testimony in its If either party to a suit sets up a promissory note, and the execution of it is denied, the party offering it is bound to prove it; but if the execution be admitted by the adverse party, who claims that he has paid it, the burden of proving such payment rests upon the party who claims the benefit of The analogy of such a case to the one before us is, so far complete as to impose upon the complainant, who sets up this new fact, by which alone he hopes to protect himself, the necessity of proving it, by at least furnishing a preponderance

of evidence in its favor. Has he done so? Taking the evidence as it stands before us, he certainly has not. He says himself, in his evidence, that the fifty-one hundred dollars was not a bonus for the loan of the \$20,000, and that the notes given for that sum were not bonus notes, but were given for a different purpose. This is all the definite evidence we have on that subject, on the part of the complainant. The defendant, in his evidence, as we have seen, states directly to the contrary, and thus, without reference to any other testimony, the evidence seems balanced, without a preponderance on either side, for there is nothing in the evidence furnished, outside of the parties themselves, which shows that any more credit is to be given to the one party than to the other. The defendant is no more interested in defeating this claim than the plaintiff is in sustaining it; perhaps not so much so, for the complainant, in addition to his pecuniary interest, has his character to sustain against the charge of being & usurer.

But suppose I am wrong in saying that the burden of proof is shifted from the defendant to the complainant, in consequence of his admissions before mentioned, and that in still rests on the defendant, is there not positive and distinct evidence in the case, from disinterested witnesses, which goes to corroborate and confirm the testimony of Barcalow, and contradict that of Sanderson, and which shows a clear preponderance of testimony on the part of the defendant, showing these to be in fact bonus notes given as a consideration tor the loan, and without which it would not have been made?

It will be borne in mind that we are a tribunal of fact as well as of law, which is to examine, construe, and weigh the evidence, and give to it its legal force and effect, the same as the Chancellor, or a jury might do, if such case were before them.

In corroboration, then, of the defendant, we have the evidence of John McGraw. He seems to have been familiar with the parties, and with their business. He was present at the meeting when it is conceded these notes were given,

and although it does not clearly appear that he saw them, yet he learned from the parties that they were given, and from both of them he learned the purpose for which they were given. He says, in answer to a question, that he understood from the parties that they were given in connection with this loan. Sanderson says they were entirely a different transaction, given to him for Lindsley's interest, and to assist him in loaning him money at times, if he had any to spare, after he had purchased out Lindsley's interest. In answer to other questions, McGraw says that he understood from both the parties, at the time, that these notes were given in consideration of the furnishing this \$20,000. This is certainly in direct conflict with Sanderson, and in corroboration of Barcalow, and if true, so far as language can do so, establishes usury.

THE RESERVE OF THE SECTION OF THE PROPERTY OF

I am aware that McGraw, in answer to another question, expressed a view which seems to sustain the position taken by the complainant and his counsel, and I will refer to it in another aspect of the case. But there is other evidence, sustaining the defendant and contradicting the complainant, which I think we are not at liberty to disregard. The testimony of John H. Whitenach has been fiercely assailed, not because he is not a respectable person or a credible witness, but because of the manner in which he obtained his knowledge; not because he has made himself officious, or shown an undue interest in the case, but because he consented, at the request of his employer, to place himself in a Position to overhear the conversation of the parties; but the Question is not whether the mode of learning the conversation was commendable or not, but whether the witness tells the truth or not as to what he heard and saw. What reason have we to suppose that he perjured himself? If the object was to have him do this, and he was willing to undertake it. it would have been much easier to have him say at once that he was present in the office, and heard the conversation which he describes. If he had done this there would have been no Objection to the manner of obtaining the knowledge, and we Vol. IL 2R

would have had no more reason to suspect the truthfulness of his statement than we have to suspect the truthfulness of the statement of McGraw, that he learned similar things from the conversations of both the parties; and, although every opportunity existed to impeach his evidence, by showing that he was unworthy of belief when under oath, yet no attempt was made to do so, although the nature of his testimony, if true, was very important in the case; and we are bound to suppose that no such effort would have been successful if it had been attempted.

An effort is made, however, to show that Sanderson was, at the time named, not at Somerville, but at his home, some seven or eight miles off, but this entirely failed. There is some evidence that he was at home in the after part of the day, and then left for New York, arriving there about nine o'clock in the evening; but there is no evidence to show that he might not very easily have taken a train of cars to Somerville, and another one back again in the forenoon of that day.

On the other hand, the testimony of Whitenach, on the point of Sanderson being in Somerville and at Barcalow's office on that day, is confirmed by evidence more reliable than the mere memory of witnesses as to dates. The witness, Thomas Rogers, says he was at Barcalow's office on the 10th of January, and saw Sanderson there; and in confirmation of this he says it was a very cold day, and he asked Barcalow to give an order for some coal; he gave him the order, and he took it to Manning's and got the coal. Manning produces this order, in the handwriting of Barcalow, and it is entered in his book of sales, on the 10th of January, 1859, the day mentioned by Whitenach.

Whatever we may think then, of the propriety of the mode of reducing the admissions of the defendant to evidence, there is no legal reason for rejecting his testimony as false, any more than that of any other witness; and unless we really and conscientiously believe it, and for sufficient cause, to be untrue, we cannot legally reject it merely on the ground of the impropriety of the manner in which it was obtained.

Taking it, then, as evidence in the cause, it does in its erms certainly corroborate the testimony of Barcalow, and entradict that of the complainant, for he says that he heard anderson state, in reference to a loan of \$20,000, that the onus was \$5000, in six notes of \$850 each, given when the loney was loaned. This, with the evidence of McGraw, laces a clear and decided, as well as legal preponderance of vidence on the side of this defence.

But suppose we look at this case from the point of view resented by the complainant, are we not necessarily forced o the same conclusion?

The position taken by Sanderson, in his evidence, is that he ad agreed with Barcalow not only to lend him the \$20,000, ut to purchase the interest of Lindsley besides, and become partner in the business, and he says that he did not underand to the contrary until he saw Barcalow in New York, n the 20th of November, 1854, when he told him he dered to purchase it himself; that the partnership idea was ien given up, and that Barcalow then, for the first time, fered and actually gave him the \$5100, to relinquish his aims to be a partner, or, as it is insisted, to compensate im, in some measure, for the profits which he might have ecieved if he had become a member of the firm. The whole f his testimony on this subject presents a rather remarkable tatement of facts. In 1853, when solicited by McGraw, nd spoken to by Barcalow, simply to purchase McGraw's inerest in the lumber business, not to loan \$20,000, or any other um, he declined to do so, on the ground that he had not the neans, although he had then sold out his staging business, nd wanted to invest his money; and yet, in the year after, e not only agreed to purchase the interest of McGraw, which ad then passed to Lindsley, but to loan Barcalow \$20,000, esides. And although he says that he had all the funds with im at Somerville, either in cash or in checks, on the 18th f November, 1854, to pay the whole balance to be advanced n the mortgage, and at a time when he was expecting also o buy out the interest of Lindsley, yet two days thereafter,

at New York, when he had abandoned the idea of purchasing Lindsley's interest, he advanced no money on the mortgage at all, but, instead thereof, endorsed the notes of Barcalow on long time, and paid them off as they became due.

It appears, too, by this testimony, that Sanderson, in addition to the mortgage of \$20,000, had contracted for Lindsley's interest, and that the contract was so obligatory that Barcalow was forced to give him \$5100 to buy him off from it. Yet all this time Lindsley, the owner of this interest, had never been spoken to on the subject, nor had the price which Sanderson was to pay for it, ever been named by any one, and yet he had agreed to take it without regard to the price.

We learn too, by this evidence, another curious fact, that Barcalow was very solicitous and urgent to get Sanderson into the firm; but as soon as he agreed to go in, he voluntarily gave him \$5100 to have him stay out, Sanderson asking \$6000, more than half of all that Lindsley's interest brought, either in 1853 or in 1854; and finally we are told that Barcalow, either through folly or benevolence, or from some other cause, voluntarily agreed to pay, and did pay, nearly \$17,000 to get Lindsley's interest, when he might have got it for between eleven and twelve thousand, and that he paid him \$5100, on account of future profits from a concern in which Sanderson had no interest whatever, to which he had never contributed a farthing, on account of which he had never put himself to the slightest inconvenience, on which he had no claim whatever, and which Barcalow, whom the counsel call smart, was under no obligation to pay-

Now is it possible to believe all this, even if Barcalow, McGraw, and Whitehead had not contradicted it? Sanderson here expressly admits that he received all this money, and at the time when the loan was finally adjusted, but can any one believe that it had nothing to do with that loan, or that it would ever have been paid at all, if that loan had never been made? There can be but little if any doubt that the transaction was spoken of in the way mentioned. The parties,

when speaking of the subject in the presence of others, probably did not in terms call the money bonus money, nor the notes bonus notes, but they spoke of them as anticipated profits from the lumber business. Hence McGraw, when he says he understood from both the parties that these notes were given in consideration of his furnishing this loan of \$20,000, yet that it was not said in that language, but that Sanderson had talked of going into partnership, and was to furnish about \$20,000 in money, but on reflection he objected to going into partnership, and preferred to furnish this amount of money, and let Barcalow have the business himself, and that these notes were for anticipated profits in the business. Profits, to be sure, from a firm to which he had not only contributed nothing, but into which he himself, as McGraw says, refused to enter.

This same idea of calling this extra money profits, and not a bonus, is also found in the defendant's answer, prepared before we had any evidence on the subject. He there sets up that the complainant was at first induced to enter into partnership with him by the purchase of Lindsley's interest, and consented to do so; but becoming dissatisfied, he proposed to loan the defendant sufficient money to enable him to purchase such interest, provided he could receive a bonus of \$1700 per year for three years, "in lieu of a portion of the profits of said concern and business."

It appears then, not only by the evidence of Barcalow, but by that of McGraw also, that Sanderson was unwilling to enter into this partnership; and if we throw out of view the testimony of both Sanderson and Barcalow, we still have it proved by the evidence of McGraw, that Sanderson declined going into this firm as a partner. And if he declined to go in, we cannot possibly suppose that Barcalow paid him the \$5100 to stay out, or that he paid it on account of any supposed profits to which Sanderson could by any possibility have been entitled. But still he paid it, and for what did he pay it? For what could he have paid it, except as a consideration for this large loan of money? And it can make no

difference what kind of circumlocution or indirection was adopted, or what mystic language was employed, or to what extent they called things by strange or fictitious names; if the real fact was that it was paid on account of, or as an inducement to this loan, the transaction was clearly usurious. And from this conclusion I see no means of escape, as I am forced to the conclusion that this money would never have been paid if this loan had never been made.

It was insisted, however, on the argument, that the whole evidence of Barcalow is seriously impaired by the fact, that through mistake, or for some other reason, he testified that the note for \$4112.71, held by Sanderson against him and McGraw, had been given directly from them to him, whereas it appears that it was given originally to E. S. Doughty, and was by him endorsed to Sanderson. I am not able to see the matter in the light contended for, for, in the first place, I can see no possible object that he could expect to gain by intentionally making any such false statement. In the next place, to suppose that he would wilfully pervert the truth in this respect, when he knew that the complainant held the note, and had only to produce it to overwhelm him in a serious contradiction, is not to suppose him a knave merely, but to With being this the counsel make him out a natural fool. have not charged him. Then again, he did not wait to see the result of his experiment, if it was one, but as soon as he saw a memorandum which he afterwards found among his papers. he was convinced of his mistake and took immediate steps to have it corrected. This conduct is consistent with honesty, but scarcely so with dishonesty. Had he waited until detection confronted him, and then attempted his explanation, it might have been otherwise.

I can see too, how he could easily be mistaken as to the particular form of this note, as well as to its origin. He knew that the complainant had frequently loaned him, or him and his partner, money, and had frequently held their notes. He knew that the complainant held the note in question, and had held it for the last ten years, but he probably had not seen it since the last endorsement of interest upon it,

which was in June, 1854, more than eight years previous to the time when he testified. And as he was not permitted to see the note, nor asked the question whether it had not been given originally to Doughty, by which his memory would have been refreshed, it does not seem very strange that he was under the confident belief that it was given directly to the complainant instead of to Doughty. It is a mistake which any one in the habit of dealing very loosely with another might have made. It was corrected in a very manly way, as soon as discovered, and I do not see how it should reflect seriously upon either his integrity as a witness or the general correctness of his memory.

I think, therefore, that by all the rules of law and evidence, and in any aspect in what we can view the case, the usury set up is fully proved, and that the complainant should not recover.

The decree of the Chancellor was affirmed by the following vote:

For affirmance—Combs, Cornelison, Elmer, Fort, Ogden, Wales, Wood. 7.

For reversal—Kennedy, Van Dyke, Vredenburgh. 3.

JUNE TERM, 1864.

THE WEEHAWKEN FERRY COMPANY, appellants, and CHARLES G. Sisson and others, respondents.

- 1. A remainder is vested where there is a present, fixed right of future enjoyment.
- 2. By a deed of bargain and sale in the usual form, an estate was conveyed to the grantees, in trust to permit the grantor and his family, and the father of the grantor, during their lives respectively, to enjoy the

estate, and to take the rents and profits, and after their death, in trust to convey the premises to the son of the grantor, and "to such other lawful issue as the grantor may then have living, share and share alike, in fee simple, as soon as he or they arrive at age." Held—

First. That the legal estate, by force of this conveyance, was in the trustees.

Second. That the son of the grantor had a vested interest, which was not determinable by his death before the happening of the contingency upon which the legal estate was to be conveyed to him, viz. by the determination of the intervening life estates.

Third. That the word "issue" in the conveyance in question, was synonymous with "descendants," and embraced the grandchildren of the grants.

- Where trusts and limitations are expressly deslared in a deed, the same rules of construction must be applied to them as in the case of a limitation of a legal estate.
- 4. By force of the statute, (Nix. Dig. 102, § 56.) a decree directing a conveyance to be made, vests the estate, so that the rights of the parties, in case of a variance between the terms of the decree and of the conveyance, must depend upon the former rather than upon the latter. Such a decree must be construed by the same rules as would have been applicable to a conveyance made in conformity to it.
- 5. When a final decree in Chancery is complete in itself, its language being intelligible, the bill and answer cannot be read for the purpose of limiting its force and controlling its legal effect.

This was an appeal from a decree of the Chancellor. The opinion is reported in 2 Beasley 168.

On the 10th of August, 1807, Mindert Garrabrants (2d) executed to the father and brother of his wife a conveyance in fee of all his lands, including those claimed by the respondents. The conveyance was upon certain trusts, therein specified. In the following year he exhibited his bill in Chancery, setting up a mistake in the limitations of the trusts, and on the 9th of September, 1808, a decree was made, vacating the deed, and directing him to convey the premises, in a certain specified time, to the trustees, upon certain trusts defined in the decree, to wit; in trust for the use of himself and his father, Mindert (1st), for life, and in the language of the decree, "that then the said trustees, &c., shall convey the whole of the said premises to the said Min-

dert Garrabrants (3d), son of the said Mindert Garrabrants, jun., and the said Effie Garrabrants, his wife, one of the defendants in this cause, and to such other lawful issue as he, the said Mindert Garrabrants, jun., the complainant, may then have living, share and share alike, in fee simple, as soon as he or they arrive of age, reserving to the widow of the said Mindert Garrabrants, jun., if any he should leave, the said widow's legal estate of dower in the said premises."

The deed was not made within the time directed in the decree, but shortly afterwards, and contained a declaration of trusts, slightly variant in terms from the language of the decree

In 1825, Mindert Garrabrants (1st), one of the cestuis que trust for life, died. In 1834, 1835, and 1836, Mindert Garrabrants (3d), by deed of bargain and sale, with covenants of general warranty, conveyed the premises in dispute to different parties, from whom the appellants claim title. Mindert (3d) died in 1837, leaving two daughters, who, with their husbands, are the respondents. Mindert (2d) outlived his son, and died in 1846. The trustees are dead, and in 1852, the only son and heir-at-law of the survivor of the trustees made a conveyance of the property in dispute to the said two daughters of Mindert (3d), as the only lawful issue of Mindert (2d) living at his death.

Mr. J. P. Stockton and Mr. Gilchrist, for appellants.

Mr. A. O. Zabriskie and Mr. Williamson, for respondents.

The opinion of the court was delivered by

THE CHIEF JUSTICE. Both parties to this controversy claim title to the premises in question, by force of the limitations of trusts created by Mindert Garrabrants (2d), and the question, therefore, is as to the just construction and legal effect of those limitations.

The appellants' title is derived from the deeds of conveyance executed by Mindert Garrabrants (3d), while the re-

spondents, the two daughters of Mindert (3d), claim through the conveyance made to them by the heir of the survivor of the trustees, in pursuance, as they allege, of the terms of the trust, as the lawful issue of their grandfather, Mindert (2d.)

The decision must rest on the solution of the question, what estate had Mindert Garrabrants (3d) in the premises?

The appellants, claiming to hold under him, contend that at the time he passed away the title, he had a vested remainder, and that at the time of the death of his father, Mindert (2d), he was the only person living, who answered to the description of the issue who were to take, within the meaning of the trust.

First, then, was the estate of Mindert (3d) a vested or contingent remainder?

The deed which was executed is, so far as relates to the legal title, in the ordinary form of a deed of bargain and sale, conveying the estate to the trustees in fee, and consequently the legal title became vested in them, the effect of the statute of uses being spent in perfecting such title. The trusts declared were a life estate in favor of the grantor and his father, and the further direction to the trustees was, upon the death of the survivor, to convey the premises unto Mindert Garrabrants (3d), and to such other lawful issue as he, Mindert (2d), should then have, share and share alike, in fee simple, as soon as he and they should arrive at full age.

Thus, it will be perceived, the estate was limited, after the expiration of the longer of two lives, to Mindert (3d), and such other lawful issue of the settler as might be living at his death. As these trusts and limitations are expressly declared in the deed, the rules of construction must be the same as in case of a limitation of the legal estate, and it would seem that the application of the ordinary rules which test the character of legal estates, to these trusts, free the question from all uncertainty. Directly on the execution of the deed, there was fixed in Mindert (3d) a present right of future enjoyment. The only uncertainty attending his estate was, that the remainder so passed to him might expire before the determination of the particular estates. But this is

the unavoidable infirmity of all remainders. In all cases, as it has often been observed, the remainder-man may die without issue before the running out of the particular estate. On the creation of this estate, the remainder-man had the right of future possession in as perfect a form as was possible; his estate was limited on an event that was certain to happen, and he was capable of taking at any time the particular estates might be spent. His estate is evidently embraced in the usual description of a vested remainder. Fearne says, "a vested remainder may be defined to be one that is so limited to a person in being and ascertained, that it is capable of taking effect in possession or enjoyment on the certain determination of the particular estate, without requiring the concurrence of any collateral contingency." Fearne on Rem., § 173, p. 61, (4th Am. ed.)

"It should be remembered too," to use the language of Professor Washburn, "that no degree of uncertainty as to the remainder-man's ever enjoying the estate which is limited to him by way of remainder, will render such remainder a contingent one, provided he has by such limitation, a present, absolute right to have the estate, the instant the prior estate shall determine." 2 Wash. on Real Prop. 227.

It seems clear then, that the remainder which passed to Mindert (3d) was vested, and in no wise contingent, in the legal sense.

If this point had not been formally taken on the argument before this court, I should not have thought it necessary to refer to authorities in its elucidation.

According to the foregoing view, Mindert (3d) was entitled to at least a third of the estate in remainder. And this leads to the second topic of discussion, was he entitled to the residue, or did each of his two daughters equally share the remainder with him?

The investigation of this point requires an examination of the precise language of the limitations of the trust, as well as the application of rules of construction which are, to some extent, dependent on the character of the instrument to be

interpreted. It, therefore, becomes necessary at the outset to settle whether the terms of the trust are to be regarded as contained in the decree of the Court of Chancery, or in the deed which was subsequently executed in conformity thereto.

The history of the decree and the deed is briefly this: On the 10th of August, 1807, Mindert Garrabrants (2d) executed a deed of trust to his wife's father and brother; and in the year following he applied to the Court of Chancery to set aside such conveyance, on the ground that it did not conform to his intentions. The court granted this prayer, and in its decree declared, in explicit terms, the new trusts on which he should convey the property to the trustees, directing such conveyance to be made within a specified period. The deed was afterwards executed, but not within the time limited.

By the act, (Nix. Dig. 102, § 56,) and which has been in force since the year 1799, it is enacted, "Where a decree of the court of chancery shall be made for a conveyance, release, or acquittance, and the party against whom the said decree shall pass, shall not comply therewith by the time appointed, then such decree shall be considered and taken in all courts of law and equity, to have the same operation and effect, and be as available, as if the conveyance, release, or acquittance had been executed conformable to such decree."

It was contended by the counsel of the appellants, that as the deed above mentioned was not executed within the time limited in the decree, the estate vested under the decree, by force of this statute, and that, consequently, it is the decree and not the deed, which is to be construed.

With a view of considering the effect of the decree, I shall, for the present, assume the correctness of this position.

Regarding, then, the decree as the depository of the trust, and as the subject of construction, it was next insisted that its meaning was to be ascertained by the use of far different rules of construction than those which obtain in the interpretation of sealed instruments. It was said that the strict rules applicable to the construction of deeds, were not to be applied to the construction of decrees.

In support of this theory a multitude of cases were cited, ich tended to show that it is the usual practice in the art of Chancery, both in England and in this country, en the decree directs a conveyance to be made, to refer it a master to settle the terms of such conveyance, and that : words of such decree are subject to a liberal construction. t it cannot escape observation, that the decrees referred to : interlocutory and not final in their character, while in decree under consideration, no reference whatever was lered, but the Chancellor settled and defined the trust thout the aid of the master. The competence of the court make such decree cannot be disputed. It is the ordinary irse to refer matters of account for the examination of a ster, yet, if the court, without such recourse, should itself ust and settle the account in a final decree, such decree ıld not properly be placed in the same grade with a merely erlocutory order. I have not been able to perceive that decree in question bears any resemblance, considered as subject for construction, to those referred to in the cases ed.

But it was further urged, that the bill and answer were rts of the record, and that it was legitimate, when the aning of the decree was drawn in question, to resort to em for the purpose of construction. The offer was to show it the term "issue," contained in the decree, had been ad in the pleadings by the settler, in the limited sense of ildren.

The cases referred to, do not, in my opinion, sustain, in substantial degree, the principle contended for. For some rposes, it is not doubted, the pleadings in a suit in equity to be taken and examined in connection with the decree is certainly true, as it was insisted, that the rule of law reires the pleadings to be adduced, when the decree is brought o court as evidence. The reason of this rule is obvious. ere are few decrees which do not, in some particulars, er to the pleadings, either expressly, or by necessary imcation. In such cases, where the decree refers to the plead-Vol. II.

ings, or to an intrinsic document, as containing a statement of facts necessary to the decree; and not embodied in it, such pleadings, or such document, as far as referred to, upon general principles, become part of the decree, for every purpose of construction. But in the case before us the decree, on the point in issue, made no allusion to the pleadings; it was complete and intelligible in itself; and the pleadings were to be ransacked to give it a meaning which its language, without such help, would not convey. I have examined with care the many cases on the printed brief of counsel, and I do not find one of them which countenances such a proposition. I do not find even a dictum which warrants the idea, that where a final decree has been made, which is complete in itself, and in which the language is intelligible, the bill or the answer can be read for the purpose of limiting the force of its words and controlling its legal effect. I think the sound doctrine is, that a decree in equity rests on the same ground, in this respect, with a deed, or a judgment at law.

This case, in my apprehension, would afford an illustration of the impolicy of admitting the contrary doctrine. The offer here was to show, that although in that part of the bill of complaint in which the terms of the trust were stated and defined, the word "issue" had been used in the same onnection in which it is now found in the decree, yet that in other parts of the bill, the word "children" was referred to; so that from the pleadings, taken as a whole, it was clear, that Mindert (2d), the settler, had used the word "issue" in the sense of "children." In other words, the Court of Chancery sitting in this case, was asked to go back and review the record of a suit decided over half a century ago, and ascertain from that record the intention of the settler, in order to arrive at the intention of the court. Now, it seems obvious that it was the business of Chancellor Bloomfield, to ascertain the intention of the settler, and express such intention in his decree. We are bound to suppose that he discharged His decree certainly purports to do so, and for that duty. this court to decide that the decree does not carry into effect

the trust contained in the pleadings, and to enforce it in a sense not warranted by its terms, would amount simply to a reversal of such decree, and that too, in a collateral proceeding,

Thus far this point has been considered, irrespective of the effect of the statute of this state, which has been above recited. ' The Chancellor held that the terms of the decree, by force of the act, must be construed precisely as the conveyance itself would have been, if executed within the time appointed for its execution. This seems, clearly, to be the correct rendering of the statute. The language of the act is, that the decree shall have the same "operation and effect" as if the conveyance had been executed "conformable" to such decree. A conveyance executed conformably to a decree, must, as I think, be so executed as to give it the same legal effect as the decree; the two need not be in the same words, but their efficacy in law must be identical. Nor do I think that a decree can have the same "operation and effect" as a deed, unless the same rules of construction are to be applied to each.

It should not be overlooked, also, that this matter has a bearing of some general interest. In most cases of decrees to make conveyances, against parties non-resident in this state, such decrees, by force of the act, are to take the place of deeds. On this account, as in the form adopted in this case, they should be specially drawn, so as to settle, definitely, the qualities and legal character of the estate which is to vest under them. As they are thus to become the muniments of the title, it would seem to be unwise to apply to them methods of interpretation, which must inevitably introduce uncertainty in their legal operation.

There is one other preliminary matter to which it is proper to advert.

It was a part of the argument, that the trusts in question were executory, and that on this account, much latitude of construction was admissible.

It is conceded that there is a difference in the mode of construing a certain class of trusts executory, from that which

is applied to trusts executed. In a certain sense, all trusts are executory; but a critical examination of the decisions will show, that to be executory so as to fall within the relaxation of the ordinary rules of construction, the limitations of the equitable interest must be incomplete, and something must be left to the trustee to define and settle. Lord Northing. ton, in the case of Austen v. Taylor, 1 Eden 366, thus delineates, with distinctness, the modern doctrine: "Whenever the assistance of this court (equity) is necessary to complete a limitation, in that case, the limitation in a will not being complete, that is sufficient evidence of the testator's intention that the court should model the limitations; but where the trusts and limitations are already expressly declared, the court has no authority to interfere, and make them different from what they would be at law.'

In the case before us, the limitations of the trust have been defined by the settler himself; the whole duty of the trustees was merely formal, that is, to make conveyances on the occurrence of specified events of legal estates of definite quality. I think it was properly held, that with regard to such a trust the same rules of construction were to be used, as are applicable to sealed instruments relating to purely legal rights.

In addition to the cases cited on this point in the opinion of the Chancellor, see Lewin on Trusts 177.

The conclusion, then, to which my examination of the foregoing points has led me, is that the ordinary rules of construction, proper to sealed instruments, are to be applied to the language creating the trusts in question, whether that language is to be considered as residing in the decree or in the deed.

The clause to be construed, and on which the controvery depends, is that portion of the limitation of the trusts, which relates to the disposition of the property after the expiration of the life estate. The direction to the trustees is, "to convey the whole of said premises to said Mindert Garrabrants (3d), &c., and to such other lawful issue as he," the settler, "may then have living, share and share alike, in fee simple." The

descendants of the settler were his son, Mindert (3d), and the two daughters of Mindert (3d); and the question is whether these two daughters answer to the description of "such other lawful issue" in the foregoing clause of the deed; and whether, therefore, as such, they take equally with their father.

That the granddaughters are as much the "issue" of their grandfather as their father was, cannot be denied. Standing uncontrolled by the context, the word "issue" is synonymous with descendants. Therefore, unless in some way limited in its sense, it embraces equally the son and his children. The argument then attains this point, is there, in the language of the deed, or what I consider the same thing, the decree, anything to limit the signification of this term?

It is said that the intention could not have been to distribute the property equally, between the son and the descendants of the son. But we cannot legitimately know anything of the intention, except from the language of the deed. And even if the intention were certain, it could not limit the effect of a term of clear signification. If the terms used were doubtful, then the intent of the parties would become ma-But the words of a deed cannot be curtailed or distorted from their full and proper signification, although the court might be satisfied that such words have been employed ignorantly, or by inadvertence, and express a meaning different from that intended. The word "issue" clearly means grandchildren, and as the intent must be ascertained from the language employed, we are bound to consider that it was intended to embrace descendants of the second, as well as of the first degree. The word cannot be limited except by express words, or a necessary inference tantamount to express words.

Some stress was laid on the phrase "such others," as indicative of issue of the same degree as the son. But these words are not susceptible of such meaning. With as much propriety it might be argued that such terms impart issue of the same sex as the son. If the expression should be now

used, "the judges of this court, and all such other persons as are here present," it could scarcely be maintained that the class embraced in the expression "such other," meant persons of the degree of judges. The words "such other," in such connection, have a familiar and well settled meaning. The expression "such other issue," in such connection as we find it, clearly takes in the grandchildren. I think the language should not be frittered away by refinements. In questions touching the construction of deeds, where subtlety begins sound law usually ends.

That the word issue has, in law, the signification thus ascribed to it, is the common doctrine of the books. "The word issue," says Jarman, vol. 2, p. 33, "when not restrained by the context, is co-extensive and synonymous with descendants, comprehending objects of every degree. And here the distribution is per capita, not per stirpes."

"Where the description 'issue' is employed in a will as a word of purchase, it will, in its ordinary import, comprise all those who claim as descendants from or through the person to whose issue the bequest is made, i. e., grandchildren and great grandchildren, as well as children; and in order to restrain this usual sense of the word, a clear intention must appear upon the will." 2 Williams on Ex'rs 999.

But in addition to the fact that this word issue has the extent of signification which the above named writers attribute to it, a still more important feature remains to be noticed, which is, that in deeds the word invariably has a technical meaning, being always used as a word of purchase, and when so used universally including descendants of every degree. The judicial decisions and text writers all concur on this point, as will conclusively appear from the following citations. Fearne on Rem. 106, 118; 4 Kent 230; Ram on Wills 115; 6 Rep. 17; Doe v. Collis, 4 T. R. 299; Bagshaw v. Spencer, 2 Atk. 582; Coke Litt. 20-6; 1 Roper on Leg. 158; 2 Spence's Eq. Jur. 154; Butler v. Stratton, 3 Brown Ch. C. 367; Cook v. Cook, 2 Vern. 545; Myth v.

Shreve v. Shreve.

Blackman, 1 Ves., sen., 195; Davenport v. Hanbury, 3 Ves. 287.

The word "issue," then, in its ordinary legal meaning, embracing grandchildren as well as children, and possessing as it does, when used in deeds, a technical sense to the same effect, I am irresistibly led to the conclusion, that, as the daughters of Mindert (3d) were severally born, the estate opened to let them in, and that they each took an undivided third part of the premises as tenant in common with their father.

The decree should be, in all respects, affirmed.

The decree of the Chancellor was affirmed by the following vote:

For affirmance—Beasley, C. J., Elmer, Fort, Haines, Kennedy, Ogden, Van Dyke, Wales. 8.

For reversal—CLEMENT, VREDENBURGH. 2.

STACY B. SHREVE and others, appellants, and ELIZABETH SHREVE and others, respondents.

- 1. Every devise of real estate is, in its nature, specific; but this rule does not apply to a term of years embraced in a general residuary clause. Under such circumstances, such term will be put on the foot of personalty with regard to the payment of debts.
- 2. The first provision of a will was a direction to the executors to pay off all debts. Among other gifts, the testator gave to his daughter-in-law the sole and exclusive use of all the rents and profits of a certain farm. known as "the Biddle farm," to be held by her from the time of his decease until the 25th March, immediately preceding the time when his grandson J. S. should arrive at twenty-one, with a provise that the daughter-in-law should release to his executors, all claims she might have against his estate. From the 25th day of March, before designated, the Biddle farm was devised to testator's two grandsons. By a residuary clause, the testator gave all the residue and remainder of his estate (undisposed of) to his four

Shreve v. Shreve.

daughters, subject (in the language of the will) "only to the payment of all just claims against me on note or book account, funeral charges, testamentary and incidental expenses, and commissions." The estate was indebted to the daughter-in-law by bond, in the sum of \$5000, which she refused to release, and consequently did not take the term in the Biddle farm left to her, held—

First. That the term in the Biddle farm was not specially appropriated to the payment of the debt due to the daughter-in-law.

Second. That this term passed under the residuary clause of the will.

Third. That, in the payment of debts, it was to be considered as a part of the personal estate, and, by the terms of the residuary clause, was made subject to the simple contract debts.

- 3. As a general rule, a direction by a testator that all his debts shall be paid, will serve to charge such debts on the realty. But where the direction is that the executors shall pay such debts, such effect will not be produced.
- 4. A debt due by specialty is, proprio vigare, a burden, equally, upon specific legacies and lands devised.

The controversy in this case, related to the proper construction of the last will of James Shreve, deceased.

The will was dated August 23d, 1852. The testator left four daughters, two grandsons, (children of a deceased son,) his deceased son's widow, and his own wife, and made them the devisees of all his property. The first provision of the will is a direction to the executors to pay off and discharge all his debts. He gives then to his wife, during her natural life, the sole and exclusive use of all his plate, books, household goods and furniture, and he gives to her at her disposal, absolutely, all the groceries, meat, and provisions in his house at the time of his death. To his daughter-in-law, he devises the sole and exclusive use and occupancy of all the rents, issues, and profits of the farm, known as the "Biddle farm," including a small lot thereunto adjoining, to be held and enjoyed by her from the time of his decease until the 25th March, immediately preceding the time when his grandson, James Shreve, should arrive at the age of twenty-our years, with the proviso, and upon condition, that his said daughter-in-law should, within three months after his decease,

cute and deliver to his executors a full and absolute rese and discharge of all claims and demands she might have inst his estate. To his two grandsons, from the said 25th of March, immediately preceding the majority of his ndson, James, he gives the Biddle farm, as joint tenants, h remainder to their issue in fee, and in default of issue, the right heirs of the testator. He also gives to his ndsons one-third part of his pine lands and cedar swamps. his four daughters, the testator gives his homestead farm . two-thirds of his pine lands and cedar swamps, and an ite of the same character as that devised to his grandsons. then devises and bequeaths to his four daughters, and ir heirs and assigns forever, all the rest, residue, and reinder of his estate, wheresoever the same may be found, to equally divided among them, share and share alike, sub-; (in the language of the will) "only to the payment of all t claims against me on note or book account, funeral .rges, testamentary and incidental expenses, and commisns." The testator appointed two of his daughters and his -in-law, to execute his will. They, together with the other ighters of the testator, have filed this their bill against two grandsons, who are infants, and who appear and end by their guardian.

The testator left one specialty debt due on a bond given him to his daughter-in-law, the principal of which was 100. The daughter-in-law refused to comply with the viso upon which the devise was made to her of the Biddle m. The devise to her, therefore, did not take effect, and s debt which she refused to release, must be paid out of estate. The other debts were very considerable. All personal assets have been appropriated to pay the simple stract debts, of which there still remains a large amount paid. See further, for statement of case, the opinion of the ancellor. 2 Stockt. 387.

Mr. P. D. Vroom and Mr. Browning, for appellants.

Mr. Carpenter and Mr. Wilson, for respondents.

The opinion of the court was delivered by

THE CHIEF JUSTICE. The question is, what part of the property of the testator is to be held liable for the payment of the remaining simple contract debts, and the specialty debt referred to in the preceding state of the case.

The property undisposed of, is the interest in the Biddle farm, being a term of years intervening between the testator's death and the twenty-fifth day of March, immediately preceding the coming of age of James Shreve, the testator's grandson; the specific legacy to the testator's widow, of the plate, furniture, &c., the devise to the grandsons, and the devise to the four daughters.

The term in the Biddle farm has now expired, and has produced, in rents, the sum of \$4350, which is in the hands of the executors. The principal question discussed was as we the legal appropriation of this fund.

This term in the Biddle farm was given by the testator we his daughter-in-law. Its duration would have been four years. The farm itself was devised to her two sons, and they were directed to pay to their mother, during her widow-hood, an annuity of two hundred dollars. But both the term of years and the annuity, were made to depend on the condition that she would, within three months after the decease of the testator, execute a release of the money due on her bond. This release she refused to execute, and as the term of years therefore could not pass to her, and as it was not further disposed of by express direction in the will, its appropriation is to be settled by the court, in accordance with the rules of law. This will be, then, the first subject of inquiry.

In the debate before this court, it was urged by the counsel of the appellants, that although the interest in the Biddle farm failed to pass to the daughter-in-law on her refusal to comply with the specified condition, yet, nevertheless, it was, in equity, to be considered as specially set aside and appropriated to the payment of the bond before mentioned. This argument was sought to be upheld on the ground that such peared, in the will, to be the design of the testator. There

can be no doubt that the testator supposed that the provision made by him for his daughter-in-law and her sons, would be accepted by her, and that, consequently, the debt due to her would be discharged. But the difficulty is, that the payment, in the only mode provided, has been defeated by a circumstance apparently not contemplated by the testator, and against which he has, therefore, made no provision. There does not seem to be the least indication in the will, that in the event of the refusal of the daughter-in-law to accept the gift on the proffered terms, either the land or the term should be charged with the bond debt. It is true that we are to look at this as a question of intention in the testator, but the intention is not to be conjectured arbitrarily: it must be found in the express words, or be the fair deduction from the words of the will itself. But it is difficult to ascribe to the testator, the intention now suggested. The consideration for the relinquishment of the debt was not only the term in the farm, but an annuity of \$200. How could he have supposed this arrangement would take effect, if the daughter-inlaw refused to accept the terms? It then obviously became impracticable. The annuity, during widowhood, could not be paid, and where is the intention to be found in the will, to substitute, in lieu of it, a sum in gross? The court is asked to require the devisees of the farm to pay, instead of the annuity, a sum exceeding two thousand dollars. It is not necessary to pause to consider whether such plan would le equitable or otherwise; it is enough to say that such plan cannot be found in the will. Indeed, from the absence of all provision on the subject, it is evident that the emergency which has occurred, did not present itself to the mind of the testator.

The principle of the decisions cited in support of the theory that the debt was a charge on the land, does not in my opinion apply to the case. Those decisions belong to a class of cases which establish the doctrine, that when real estate is devised on condition that the devisee shall pay a third person a certain sum, such person has the right to look

to the land for the payment of the bequest, although the devisee refuse to accept the devise. In such dispositions, it is obvious that the gift to the legatee in the form of a charge, is independent of the gift to the devisee, and it is not surprising that the courts have protected the interest of each, and held that the legatee cannot be defeated by the act of the devisee, but may follow the land into the hands of the heirat-law, who will be considered a trustee for him. Such was the principle in Wigg v. Wigg, 1 Atk. 382; Birdsall v. Hetelett, 1 Paige 32.

On this point of the case, therefore, I concur in the opinion of the Chancellor, that on the refusal of the daughter-in-law to receive the term on the imposed condition, it passed, by force of the residuary clause, to the testator's four daughters. It was not denied on the argument that this would be the result, on the rejection of the theory of a special appropriation of this interest to the payment of the debt due on the bond.

This term then having lapsed into the residuum, the question arises, what is to be its ultimate disposition? The Chancellor treated it as a devise of land to the four daughters, the residuary legatees, and holding that the general direction in the will to his executors to pay off and discharge all his debts, charged his whole estate with the debts, he directed this devise of the term to be placed, so far as relates to the simple contract debts, on a level with the specific legacy to the widow and the other devisees. By the express language of the residuary clause, the residuum was to be liable only to the simple contract debts, consequently, the lapsed term was considered to be not subjected to any part of the bond debt.

I am unable to concur in this view. It rests upon the ground that the testamentary gift of the term for years is strictly a devise of land, which, upon general principles, is specific, even when given to the residuary legatee. But I am at a loss to perceive how this mere chattel real is to be considered, in its technical sense, as the subject of a devise. The point appears not to have been discussed in the court below,

and is assumed in the opinion, without comment or explana-Most clearly, if the daughter-in-law had accepted the term, it would have been a mere chattel interest in her hands, and upon her death it would have been transmitted, if unspent, to her personal representatives and not to her heirsat-law. Its lapse into the residuum cannot affect its essential character. Such interest in lands has always, so far as I know, been treated as a part of the personalty. From the earliest times, long anterior to the epoch when the right to devise lands was given by statute, these terms for years, considered as chattels, were held to be the subjects of testamentary disposition. Wentworth speaks of them in the following language: "the chattels, real or personal, to which the executor becomes entitled after the death of the testator by force of a condition, will be assets; as where a lease for years, or cattle, plate, or other chattel, was granted by the testator, upon condition that if the grantee did not pay such a sum of money, or do other acts, &c., and this condition is broken or not performed after the testator's death, the chattel will be brought back to the executor, and be assets." Went. on Ex'rs 181; 2 Williams on Ex'rs 1498.

If this is the correct theory, the disposition which has been made of the interest in question is clearly erroneous. As simple personalty, it cannot rank with the specific gifts to legatees and devisees. Itself a chattel, it becomes, together with the other parts of the residue of the personal estate, the primary fund for the payment of the simple contract debts. The established rule is that the residuary legatee, as such, is never entitled to call upon either the general or special legatees or devisees for contribution in favor of creditors. As far as he is concerned it is, in the absence of all contrary indication in the will, conclusively presumed to be the intention of the testator, that he is to have the residue of the estate, if any, after debts and legacies paid. 1 Roper on Leg. 309, 357; Page v. Leapingwell, 18 Ves. 463.

This residuary fund is charged with the simple contract debts by the testator. The residue and remainder of the Vol. II. 2T

estate, which includes all the real and personal property undisposed of, is equally divided amongst the four daughters, subject only to the simple contract debts. The burden, then, being imposed on the whole residue, when the term fell in, it became subject to its share of the onus.

My conclusion, therefore, on this point of the case is, that the term of years in the Biddle farm, being incorporated as personalty with the residue of the estate, became thereby primarily subject to the simple contract debts, and that the moneys representing such interest, now in the hands of the executors, should be appropriated for that purpose, before contribution is exacted from the specific legacy or the devises. The surplus of the fund, as it cannot be made to assist in the payment of the specialty debt by reason of its express exemption in the will, must pass to the residuary legatees.

The remaining question is with regard to the payment of the debt due on the bond. This has been directed to be paid out of the specific legacy to the widow and the lands devised. The Chancellor justifies this order, on the ground that the testator has charged the whole of the estate, both real and personal, with the debts. The language of the will is: "Imprimis: I authorize and direct my executors, hereinafter named, to pay off and discharge all my just debts and funeral charges, as soon as conveniently can be done after my decease."

The cases certainly establish the doctrine that a general direction by a testator that his debts shall be paid, will effectually charge them upon the real estate. To this effect are both the ancient and modern authorities. 1 Vern. 45; S. C., 1 Eq. Cases Abridg. 197; 2 Jarman on Wills 370; 2 White & Tudor's L. C. in Eq. 297.

But there is an exception to this rule, within which this case appears to fall; it is, that where the direction to pay debts is given to the executors, the lands will not be charged. The presumption then is, that the payment is to be made exclusively out of the funds which by law devolve to the executors in their representative capacity. In this case the direction is expressly to the executors to pay the debts, and as the exception seems to be as well established as the rule

itself, the lands are not charged by such direction. 2 Jarman on Wills 523; 2 White & Tudor's L. C. in Eq. 298,

But while I cannot concur in the principle on which the specialty debt has been imposed in this case on the specific legacy and devises, I have come, on another ground, to the same result.

In the absence of any express charge by the will upon the lands devised, a specialty debt, proprio vigore, is a burden upon them to the same extent as it is upon a specific legacy. The general principle is that, on a failure of personal assets, the specific legacies and devises must abate equably in payment of creditors. This rule seems not unreasonable, and is founded in the presumed intention of the testator. As the devise and the legacy are both specific, the law deduces the fair conclusion that it was not the purpose of the testator to prefer the one to the other, and that, as they possess an equality of right, their burden should be equal. The specialty creditor can look to the land as well as the personal assets, and there seems to be no reason why, in regard to this class of debts, the one kind of property should have an immunity which the other does not possess. The leading case on this head is that of Long v. Short, 1 P. Wms. 403. The point was also elaborately discussed, and the doctrine maintained by Vice Chancellor Bruce, in the case of Tombs v. Roch, 2 Coll. 490.

I think the decree in the Court of Chancery has properly marshaled the assets for the payment of the specialty debt.

On the other point the decree should be reversed, and the case remitted with the requisite instructions.

The decree was reversed in part, as above, by the following vote:

For reversal—Beasley, C. J., Cornelison, Elmer, Fort, Haines, Kennedy, Ogden, Van Dyke, Vredenburgh, Wood. 10.

For affirmance—CLEMENT.

Ų,

Hunterdon County Bank v. Nassau Bank.

THE HUNTERDON COUNTY BANK vs. THE NASSAU BANK.

The final decree in the above stated cause was made agreeably to the opinion delivered in the case of The Broadway Bank v. McElrath, 2 Beasley 24.

That decree, among other things, adjudged the Nassau Bank, who were the complainants in chancery, entitled to have two hundred and twenty-five shares of the capital stock of the Trenton Iron Company, held by them, sold, and the proceeds thereof applied to the payment of the several loans, and the balance thereof due them from Thomas McElrath. The Ilunterdon County Bank have appealed from that part of said decree, for that they are entitled to have the said shares sold under, and by virtue of the attachment in the complainant's bill mentioned.

The appeal was argued by Mr. B. Vansyckel and Mr. Browning, for appellants, and Mr. E. W. Scudder and Mr. A. O. Zabriskie, for respondents.

The opinion of the court was delivered by Ogden, J., affirming the decree of the Chancellor. The reporter regrets, that after diligent search and inquiry, he has been unable to find it.

The decree was affirmed by the following vote:

For affirmance—CLEMENT, CORNELISON, ELMER, FORT, HAINES, KENNEDY, OGDEN, VAIL, VREDENBURGH, WALES. 10.

For reversal—None.

NOVEMBER TERM, 1864.

JOHN B. HERBERT, appellant, and THE MECHANICS BUILDING AND LOAN ASSOCIATION OF NEW BRUNSWICK and others, respondents.

- 1. A member of a building and loan association executed to it, as secuity for a loan, a mortgage, and as collateral thereto, assigned over ten hares of its stock of which he was the owner; subsequently he executed a nortgage on the same premises to H. and after that conveyed to him the nortgaged premises in fee. Judgments were then obtained against the nortgagor, and the ten shares of stock levied on. Held, that the equity which H. had acquired, as against the mortgagor and the association, to have the assets so marshaled that the debt of the association should be paid primarily out of the ten shares of stock, could not be impaired or affected by the subsequent intervention of the judgment creditors.
- 2. In the marshaling of assets, mere judgment creditors do not occupy the same vantage ground with bona fide purchasers for a valuable consideration, without notice.
- 3. The general rule is, that the right of the creditor to marshal the assets of the debtor, is absolute against the debtor himself, and cannot be taken away by the subsequent action of other creditors.
- 4. The present case, upon all the other points as reported in 1 McCurter 219, affirmed.

On the 7th of July, 1856, John B. Conover executed a mortgage to the Mechanics Building and Loan Association of New Brunswick, to secure the payment of certain moneys nentioned in the condition of a bond, bearing even date with the mortgage. Conover, at this time, was a member of the above named company, and owned ten shares of its capital stock, which, in conformity to the constitution of the association, he assigned to the company as collateral security to the mortgage debt. On the 30th of March, 1860, Conover mortgaged the same premises, with other lands, to John B. Herbert, the appellant, to secure a debt which he owed him, and on the 10th of September following, being in failing circumstances, he conveyed the mortgaged premises in fee, to Herbert, and the residue of his real estate to other parties.

Subsequent to the mortgage and conveyance to Herbert, judgments at law were recovered against Conover, and executions being issued thereon, were levied on the ten shares of stock above mentioned. It appeared in the case that Conover was insolvent.

Mr. A. V. Schenck and Mr. J. P. Stockton, for appellant.

Mr. Strong and Mr. Leupp, for respondents.

The opinion of the court was delivered by

THE CHIEF JUSTICE. The bill in this case was exhibited by the Mechanics Building and Loan Association of New Brunswick, to foreclose a certain mortgage given to it by John B. Conover. At the time of the execution of this instrument, the mortgagor was a corporator, and in compliance with a requirement to that effect in the charter of the company, assigned to it ten shares of its capital stock, of which he was the owner, as collateral security to the mortgage debt. Subsequent to the creation of these securities, Conover executed a second mortgage on the same premises included in the first mortgage, and embracing also certain other lands, to John B. Herbert, the appellant, and, at a still later date, being in failing circumstances, he conveyed the mortgaged premises in fee, to the appellant. Several judgments having been afterwards obtained against Conover, by virtue of executions issued thereon the ten shares of stock above mentioned were levied on.

It is obvious that this conjuncture of facts presents for consideration the equitable conditions of the ten shares of stock, arising out of the claims of the appellant, Herbert, and those of the judgment creditors.

This stock is a pledge in the hands of the Mechanics Building and Loan Association, and is collateral to their mortgage. The right of this company to resort, if necessary, for the collection of the debt due them, to both the mortgaged premises and the stock is admitted, but Herbert, as second mortgagee of the land, and owner of the equity of

redemption, insists that the company should be compelled to exhaust the stock before going to the land. On the other hand, the judgment creditors contend that, by the established rules of equitable distribution, the converse of this should be done, and that the land, being the primary security, should be first applied.

The due settlement of this point of dissension would seem to depend entirely on the fact, whether the equitable rights of the appellant were, at the time of the rendition of the judgments, so fixed and established as not to be liable to be affected by the subsequent action of third parties. It is quite certain, that at such time the appellant had the right in equity to require the first mortgagee to look, primarily, to the stock in question. Before the judgments were entered, the relative condition of the first and second encumbrancer was clear, definite, and in every respect incontestable. circumstances, as they then stood, presented, with entire simplicity, the ordinary case of the elder creditor possessed of two securities, only one of which was subject to the lien of the junior creditor; the right, therefore, of the latter to demand that the former should apply, in the first place, the security peculiar to himself, falls within one of the most familiar principles by which justice is dispensed in courts of The sole inquiry, then, as above intimated, seems to be, did the entry of the judgments and the levy by execution on the stock disturb these equitable relations?

As introductory to all reasoning on this subject, it is proper to premise that judgment creditors do not occupy the vantage ground of bona fide purchasers for a valuable consideration, without notice. That an honest and innocent purchaser of the stock in question, after the equities of the second mortgagee had attached to it, would hold it discharged from such latent equities, I entertain no doubt. This was the ground of decision in the case of Reilly v. Mayer, 1 Beas. 55. Assuming, what perhaps is not entirely unquestionable, that the purchaser in that case acquired the property without notice, either actual or constructive, of the



prior equities, that adjudication rests in satisfactory reasons. It bears strict analogy to that class of cases which sustain the proposition, that if the holder of the two funds, only one of which is common to himself and another creditor, release the common fund, in such case, in the event of the security retained proving insufficient to the payment of both claims, the loss will not fall on the elder creditor executing the release, provided he acted in good faith, and in ignorance of the subordinate rights. Every fair purchase has always been protected by the law with peculiar diligence. This results, in part, from the nature of the transaction, and to a certain extent from considerations of general convenience. He who pays the price on a sale, justly, and with honest intentions, acquires, in natural morality, the highest possible title to the thing purchased; and it has, at least in modern times, been considered highly promotive of the public welfare, that the circulation of property should be free from secret liens and latent trusts. Hence the doctrine, so much favored in a court of equity, of the inviolable nature of the defence of a bona fide purchase, without notice, for a valuable consideration. But a creditor who has done nothing more than to convert his debt, subsisting in the form of a contract, into a judgment, has no claim but that of diligence, to the favor of equity. Neither natural justice nor public policy enacts a preference for him over adverse claimants. He has consequently never been treated as a purchaser for He can, under his judgment, levy on execution all that belonged to his debtor, but he can take nothing more. He simply represents the debtor, and he takes the property as the debtor held it. This is the language of the authori-Thus in Newlands v. Paynter, 4 Mylne & C. 408, the interest of the cestui que trust was protected against the judgment creditor of the trustee. In Lodge v. Lyscley, 4 Sim. 70, the equitable interest of the purchaser for value before conveyance, was preferred to the claim of the judgment creditor of the vendor. And in Whitworth v. Gaugain, 3 Hare R. 416, it was explicitly held that a judgment

creditor is not a purchaser for value in the contemplation of a court of equity.

Regarding, then, the liens of the executions in this case, as destitute of those qualities which impart excellence and give preference to the equity of a purchaser, upon what ground is it that the securities in question are to be marshaled in favor of the creditors by judgment? The circumstances are such that all the parties interested must, of necessity, appeal to the equitable discretion of the court. Their relative positions are these: the complainants, who are possessed of two securities—the mortgaged land and the shares of stock—are in a court of equity, praying that they may be aided to make their debt out of one or both funds; the appellant is also present, setting up his mortgage on the land, and requesting that the complainant's debt should be cast as far as practicable on the stock; the judgment creditors, at this point, intervene, and insist that this stock shall be preserved for them. It is obvious that the legal right is in the complainant, the building and loan association, to appropriate whichever fund it may see fit, and thus disappoint, at will, either claimant. The second mortgagee and the judgment creditors both, as their sole means of protection, apply to the power of the court to control this arbitrary discretion of the company, and conform it to the standard of equity. As the court is thus bound to arbitrate and dispense these funds among the rival litigants, the sequence would seem to be undeniable, that such distribution must be altogether equitable and in strict harmony with the maxims which prevail in a court of conscience. The claimants in this case are all creditors; their rights, therefore, do not differ in kind. But the appellant obtained the first equity; and it is an established axiom, when the equities are equal, priority in time entitles to the preference. Can the judgment creditors displace this prior equity? Why? them the appellant would have obtained, without question, what he claims. Until they intermeddled, his interest certainly was not defeasible either by the willful action of the

mortgagor or that of the prior mortgagee. It has been noted that his equity could not have stood against the eminent superiority of a bona fide purchaser. But it is difficult to imagine why he is to give way to a creditor who has merely obtained a judgment. It is certain that, as a general thing, equitable interests are not thus subordinated to after acquired liens. The instance before referred to, of the purchaser of real estate, who has paid the consideration before obtaining a conveyance, being protected against a judgment subsequently taken against his vendor, is an illustration of the usual course of proceeding. It is undeniably true that assets will not be marshaled to the injury of a party over whom he who asks the aid of the court has no advantage. But here the appellant has the advantage in point of time; and it is the judgment creditors who demand that superiority of effect shall be given to their equity, which is subsequent. To make judgments thus paramount to prior equitable liens, would be to establish a rule of very great practical importance, and one which would be possessed of most comprehensive energy. It would be difficult to restrain it, if system be preserved, within narrower bounds than the whole field of marshaling assets and securities. And yet it can scarcely be applied to one section of such field without incongruity That after acquired rights give place with adjudged cases. to precedent ones, is the general gradation established by & long line of adjudications. If a judgment creditor by specialty, absorb the personal estate of the decedent to the detriment of legatees, the latter will be subrogated to the rights of the former; that is, the equity of the legatees, as it existed at the death of the testator, to require the specialty debts to be raised out of the land, in which they have no interest, instead of out of the personalty, which is the fund to which they look for payment, cannot be defeated at the mere volition of a creditor. Hanby v. Roberts, Amb. So, where lands were mortgaged, and a part of them afterwards sold by the mortgagor, it was held, that the part so purchased was not bound to contribute to the payment of

he mortgage, in relief of a party who had purchased the esidue of the premises under a sale made by force of a judgnent later in time than the first conveyance; that is, such adgment and sale were not permitted to affect the prior Gill v. Lyons et al., 1 Johns. Ch. R. 446. gain, to the same purport, is the case of Reynolds v. Tooker, 8 Wend. 591. The question there was, whether a judgment gainst a ship builder should, in the first instance, be cast n a vessel which had been bought and paid for, but not devered before the entering of the judgment, in order to leave ther property for the satisfaction of younger judgments; ut the court rejected the application, on the ground that the quities of those who had paid for the vessel attached before uch younger judgments, and that the precedent right could ot be divested by any diligence of creditors, or any act in heir favor by the debtor, which was subsequent.

In Averall v. Wade, Lloyd & Goold 252, the same priniple was adopted. In that case, a party being seized of everal estates, and indebted by judgment, settled one of hem for valuable consideration, with a covenant against enumbrances, and subsequently confessed other judgments. It vas, under these circumstances, held that the prior judgments hould be thrown on the unsettled estates, and that the later udgment was possessed of no equity which could override hat of the parties taking under the settlement. Sir Edward Sugden, who decided this case, sums up his reasoning on his point in these words: "The result on the whole is, that here is no right to throw any part of the first judgment on he settled estate, but that, on the contrary, that estate had right to be indemnified against it, at the expense of the unsetled estates, and no subsequent judgment creditor can disturb hat right after it has once attached." For further recogninition and exemplification of the same doctrine, see the fol-Withers v. Carter, 4 Grattan 407; Ziegler owing cases. 7. Long, 2 Watts 205; Bruner's Appeal, 7 Watts & S. 269; Wise v. Shepherd, 13 Illinois 41.

The rule established by these decisions will, upon exami-

nation, be found to be, that the right of the creditor to marshal the assets of the debtor, is absolute as to the debtor himself, and that although it is subject to the legal and equitable claims of prior creditors, it cannot be impaired or, in any respect, injuriously affected, by the intervention of those of a later date. This course of adjudication seems to me correct in principle and salutary in its operation, and I therefore am constrained to think that the decree appealed from is erroneous, in failing to enforce the superior equity of the appellant to have the stock primarily appropriated to the satisfaction of the first mortgage.

The point above discussed appears to have been considered a subordinate one in the court below, the important questions being those which relate to the rights of the parties, springing out of the organization and by-laws of the building and loan association. In the views entertained by the Charcellor upon these several matters, I fully concur, and think the decree should be reversed only in the particular above specified.

AGNES M. KEARNEY and others, appellants, and EDWARD KEARNEY, executor of Philip Kearney, deceased, respondent.

- 1. In the case of a legacy to a daughter of ten thousand dollars, "to be paid to her on her reaching the age of sixteen years; if, however, she die before that age, this legacy to become part of my residuary estate," held that the interest on the legacy should be paid to the child for her maintenance.
- 2. A legacy in the codicil of the same will to another daughter, of "five hundred dollars per annum, during her natural life, to be paid to her quarterly in advance by my executor, commencing with her attaining her fifteenth year," does not authorize the payment of interest to the child.
- 3. A devise to the widow, of an estate called Bellegrove, and the furniture, household goods, silver, books, paintings, statuary, and other works in the fine arts, there or elsewhere, during her natural life and widowhood,

held to entitle her to use the goods, &c., in her own or other person's house, or to let them out to hire, and that the estate in the land did not cease upon her failing to reside at Bellegrove.

- 4. Held also, that the tenant for life, in such case, was only bound to make such repairs as should be necessary to prevent waste; and that if an insurance was considered desirable, the tenant for life and remainderman must insure their respective interest, as may be deemed most advisable.
- 5. The court declined to make any order respecting the payment of the taxes assessed, or to be assessed, on the property.

This was an appeal from a decision of the Chancellor, reported ante, p. 59.

Mr. A. O. Zabriskie, Mr. Bradley, and Mr. Frelinghuysen, Attorney General, for appellants.

Mr. C. Parker, for respondent.

The opinion of the court was delivered by

ELMER, J. The bill in this case was filed by the executor of General Philip Kearney, to obtain the decision of the court upon several disputed questions, arising under the will and codicil of the deceased. Three of the defendants, who are the widow and children of General Kearney, have severally appealed from the decree of the Chancellor, in various particulars affecting their respective interests, and the questions thus raised have been fully argued before this court. It will be most convenient to consider them in the order adopted by the Chancellor, which is substantially the same as that suggested by the complainant's bill.

First, as to the legacies to the two daughters, Susan and Virginia. That to Susan is contained in the original will, and is as follows: "I give and bequeath to Susan Kearney, my daughter by the aforesaid Agnes Maxwell, the sum of ten thousand dollars, to be paid to her on her reaching the age of sixteen years. If, however, she die before that age, this legacy to become part of my residuary estate." It is a vested legacy, subject to be defeated, if the legatee dies before she Vol. II.

reaches the age of sixteen, and is not payable until that time.

For a long period, both in England and America, courts called upon to administer the law of wills, have felt constrained to go great lengths, and have "made a great stretch" so to interpret them, as to allow a maintenance for the infant children of a testator, not otherwise provided for. This has been done, by holding that the parent did not mean to deprive them of the interest on a legacy, from the time of his death, to the time fixed for the payment of the principal, although no intention to allow interest is expressed, and sometimes, even when the terms of the gift, if construed strictly, show a contrary intent. That the legacy is defeasible upon a future contingency, as in the case before us, has not been considered a sufficient reason for departing from this rule; as fully appears by the cases referred to by the Chancellor, and others, which it is not necessary to specify. Whatever might be our opinions, if this was a new question, it would be attended with dangerous consequences, to set & new precedent, called for by no controlling necessity, and thus affect the construction of many wills which have been administered, in conformity with the law established by an uninterrupted course of judicial decisions. Had no other question than this arisen upon the will and codicil before us, the court in all probability would not have been appealed to for any direction respecting it.

The decree, by its terms, declares it to be the duty of the executor, to pay the guardian of Susan, the sum of six hundred dollars per annum, being the interest of the legacy bequeathed to her. It does not distinctly appear whether the fund is, in fact, so invested, or can be safely so invested, as to produce interest at the rate assumed, clear of taxes and other necessary charges. If it shall be hereafter shown, that so much interest cannot be obtained, it will be in the discretion of the Chancellor to modify the decree in this particular, so as to allow only the actual interest received, clear of necessary deductions.

The legacy to Virginia, contained in the codicil, is very

different from that to Susan. It is as follows: "I do hereby devise to my daughter, Virginia, lately born to me, five hundred dollars per annum, during her natural life, to be paid to her quarterly in advance by my executor, commencing with her attaining her fifteenth year." That this annuity will never become payable, if Virginia dies before she reaches the age of fourteen years, was not disputed by counsel. was admitted that there is no precedent for an allowance of interest, by way of maintenance or otherwise, where the legacy was given by way of an annuity. In such a case, there is no possibility of presuming, that the testator meant that interest should be paid; there is no sum named or fund indicated, which can produce interest. It was urged, that the executor must necessarily set apart a fund, the interest of which will be relied on to pay the annuity, when it commences, and that a very short step beyond the adjudged cases, will enable the court to make the allowance desired, without departing from established principles. But it does not appear from what source the income necessary to pay the annuity will be derived; and if it should, in fact, require a part of the income arising from personal property to produce it, to require this income to be paid in advance of the time prescribed by the testator, would be equivalent to declaring by an arbitrary decree, that the annuity shall commence immediately, in the face of the explicit direction that it shall not commence until a subsequent period. A short step in this direction, would be a step too far; it being far safer to stop with the adjudged cases, than to carry principles, originally of somewhat doubtful propriety, farther than has been heretofore done.

The next question to be answered, and perhaps, as this estate is situated, the most important one, is what interest has the widow in the estate called Bellegrove, and the furniture, household goods, silver, books, paintings, statuary, and other works in the fine arts, there or elsewhere, given to her by the codicil during her natural life and widowhood. That a devise of a right to occupy and possess an estate, is in effect

a devise of the land itself, is fully established by the authorities; and that a devise to the wife of goods, plate, jewels, &c., for life or widowhood, entitles her to use them in her own or other person's house, or to let them out to hire, was established by the case of *Marshall* v. *Blew*, 2 *Atk*. 217. But the agreement most relied upon for the appellant was, that this will and codicil taken all together, show an intention on the part of the testator, that she should only occupy and possess the property by actually residing at Bellegrove and using it there, or by a surrender to the son, John Watts, as an equivalent for the annuity she is to receive in that event.

If this intention could be fairly deduced from the language of the will and codicil, read together, and aided by the situation of the property, there would be no difficulty in holding that the widow's estate for life or widowhood, is subject to be defeated by her failing to reside at Bellegrove. But no such intention appears, and none such ought to be implied, without clear and unequivocal language, rendering it free from reasonable doubt.

It is very certain that the testator contemplated the probability that his widow might prefer to reside elsewhere; for the legacy to her of an annuity of one thousand dollars, added by the codicil to the annuity bequeathed in the original will, is expressed to be, to enable her to comply with his wish that she should reside at Bellegrove, where their cherished son Archibald had died; yet he adds, that whether she reside there or not, his intention was, that she should receive the additional yearly sum of one thousand dollars. the articles bequeathed to her were not at Bellegrove when the codicil was made, and he expressly leaves them to her, whether there or elsowhere, without any direction to place It does not distinctly appear by the bill or anthem there. swers, precisely what the "estate called Bellegrove" includes; and if there be any doubt on this subject, that must be left for further investigation; nor is it necessary to determine a doubt expressed by counsel, as to what it is that must be surrendered to the son, John Watts, to entitle her

to receive for her life, the sum of five hundred dollars yearly, as an equivalent. As the case is now presented, I think it is clear that the widow takes an unrestricted estate for life, subject to be defeated by her ceasing to be a widow, in the estate called Bellegrove, whatever may be meant by that description, and in the personal property described in the first clause of the codicil, and that the Chancellor's decree respecting them is correct.

As tenant for life, she will of course be accountable for waste, but will be required to make no other repairs than such as are necessary to prevent waste. If an insurance is considered desirable, the tenant for life and remainder-man must insure their respective interests, as may be deemed most advisable. It follows also, that the widow can rent the property, real and personal, and can remove the furniture and personal chattles, as other tenants for life are entitled to use similar property.

No appeal has been taken from that part of the decree in regard to certain annuities the testator had been accustomed to pay. But the widow appeals on the ground that the decree does not order and direct the taxes upon the real and personal property given to her for life, to be paid by the executor out of the estate. The bill asks for no direction in this matter. It does not appear to whom the taxes are in fact assessed, nor can we to know to whom they will hereafter be assessed. The questions as to the incidence of the taxes, can be best decided, by a direct appeal to the courts, if either party shall think they have been wrongly assessed.

In my opinion, the decree of the Chancellor should be in all things affirmed. The costs of the appeal to be paid by the executor, out of the estate of the testator, including one hundred and fifty dollars to each of the counsel who have appeared and argued the case in this court.

VAN DYKE, J., was of opinion that the decree respecting interest on the legacy to Susan, and also in allowing the widow to remove the personal property at her own pleasure,

even out of the country, was erroneous, and ought in those particulars to be corrected, and that in other respects it should be affirmed.

The decree of the Chancellor was affirmed by the following vote:

For affirmance—Beasley, C. J., Clement, Cornelison, Elmer, Fort, Haines, Kennedy, Ogden, Vredenburgh, Wales. 10.

For reversal—VAN DYKE, in the respects above named.

NOVEMBER TERM, 1865.

WILLIAM D. GIVEANS, appellant, and WILLIAM McMURTRY, respondent.

The sheriff having advertised the complainant's property for sale, under executions, the complainant procured the defendant to advance their amount to the plaintiffs in execution, upon an agreement that the judgments should be assigned to him, and a mortgage for the amount, given to him by the complainant, and that he, the defendant, would then stay the executions—the mortgage upon foreclosure having been declared void for usury, the sheriff re-advertised. *Held*, that, as regards the assignments, the relation of borrower and lender did not exist, that the transaction amounted in legal effect to a purchase of the judgments, and that the binding effect of the judgments was not affected by the mortgage.

This was an appeal from a decision of the Chancellor, reported in 1 C. E. Green, 468.

Mr. McCarter, for appellant.

Mr. Vanatta, for respondent.

The opinion of the court was delivered by

VREDENBURGH, J. This was a bill filed by Giveans, to estrain McMurtry from selling the property of Giveans, under two writs of fieri facias, under judgments against the property of Giveans, and which judgments had been assigned to McMurtry. The Chancellor, upon the hearing of he cause, on pleadings and proofs, dissolved the injunction and dismissed the bill.

The case made by the bill was, that the sheriff having proseded to advertise for sale the property covered by the levies, liveans borrowed \$3000 from McMurtry, which Giveans took, and with it paid off the said judgments, and gave a new bond and mortgage to McMurtry for the \$3000.

The answer of McMurtry denies that the \$3000 was paid by Giveans, in satisfaction and discharge of the said judgments, and avers that the said judgments were paid with the said \$3000, advanced by McMurtry, and that the said judgments were assigned to him, under an agreement made by Giveans, that said judgments should remain subsisting liens in favor of McMurtry.

The question, therefore, made by the original bill and answer is, whether the \$3000 was paid over by McMurtry to Giveans, and by him paid over to the plaintiffs in execution, in satisfaction thereof, or whether the \$3000 was paid to the plaintiffs in execution by McMurtry, with the agreement that the judgments should be assigned to him, or held as an existing lien for his benefit.

Giveans, in his bill, expressly charges that he, on the twenty-ifth of February, 1856, paid the said judgments and executions n full satisfaction thereof. This is specifically denied in the answer. This denial must stand as true, until destroyed by proof by Giveans. The judgments are not cancelled, but on the contrary, are assigned.

I find no proof that the \$3000 was intended or used to satisfy the judgments, except that of Giveans himself, in his lirect examination. But even this is not so direct or strong as his allegations in his bill, which he also swore to. His testimony, therefore, scarcely adds any weight to his oath in

the bill. But his cross-examination explicitly contradicts his allegations in his bill. He says there, that he never received the \$3000, or any part of it, or paid any of it to the plaintiffs in execution, nor did he know who did, or how much was paid, nor does he know to this day what became of the \$3000. The evidence, therefore, of Giveans himself, shows conclusively that his bill is not true, and fails to show that the \$3000 was appropriated to satisfy the judgments.

But there is other evidence that the \$3000 was not intended for payment of the judgments. The fact that the judgments were assigned, and not satisfied of record, is strong presumptive proof that it was not the intention of the parties to pay them. But the proof is further, that Giveans himself agreed that the judgments were to be assigned, and not satisfied.

Thomas R. Linn says that before the \$3000 was paid, he took a paper drawn by his father, Robert A. Linn, one of the plaintiffs in execution, prescribing the form of the assignment of his decree to whoever should advance the money.

Mr. Thompson says that Giveans was in his office when the \$3000 was advanced by McMurtry, or his agent, and stated that these judgments were to be assigned, and the assignments were drawn by him in pursuance thereof; that the money was not paid him for the plaintiffs in execution, until he had drawn up and delivered a written agreement to procure assignments, and was then allowed to him by Mr. Ryerson, who held it as the agent of McMurtry. The said Robert A. Linn testifies, that after the lands were advertised by the sheriff, Giveans came to him and asked him if he would assign his decree, if he got a man who would find the money. He told him he would. That a few days before the day of sale, Giveans came to him and stated that he wanted him to go to Newton, receive the money, and make the assignment. He said he had got a man to furnish the money. That he sent his son down, and when he came back, he brought him the assignment to execute. He executed it, and sent it back. The evidence of Samuel Giveans is to the same effect.

The averment in the bill, that this \$3000 was advanced as satisfaction is against the answer, the testimony of the complainant himself, and the whole evidence in the cause.

The next question arises upon the supplemental bill.

This alleges that, during the progress of the original suit, McMurtry had filed a bill to foreclose his \$3000 mortgage, which he took at the time of the advancement of the money, and that the Chancellor in that decree dismissed the bill.

It is contended here now, that in that suit the Chancellor dismissed the bill for usury, that the assignments of the judgments were merely collateral to the mortgage, and that as the principal transaction was invalid for usury, all collaterals fall with it. But this assumes, in the first place, that the Chancellor annulled the mortgage for usury, which is not alleged in the supplemental bill, upon which no issue is raised by the pleadings. It assumes, in the next place, that the \$3000 was a loan.

Was this transaction, in relation to this \$3000, a loan by McMurtry to Giveans, or was it a purchase of these judgments by McMurtry from the plaintiffs in execution? It appears to me that the evidence shows that it was plainly a purchase, and not a loan. The bill and answer loosely call the \$3000 a loan. But the question is not what the parties call it, but what was it in its nature. To determine this, we must look to the transaction at the moment when it really took place. What took place before is of very little consequence, in presence of the facts that took place at the very moment of the payment of the money.

McMurtry, by his agent, Mr. Ryerson, with money in hand, went with Giveans into the office of Mr. Thompson, the agent of the plaintiffs in execution. McMurtry had the right to prescribe, then and there, upon what terms he would part with his money. The evidence conclusively shows that it was a precedent condition to the actual delivery of the money, that the judgments should be assigned. Mr. Thompson says, that Mr. Ryerson would not pay the money without

his written stipulation that the judgments should be assigned, and that this was done in the presence of and with the assent of Giveans. The giving of the mortgage, the written agreement to assign, and the payment of the \$3000 to the agent of the plaintiffs, were all cotemporaneous acts. In the absence of all evidence, what would be the inference of law? would it infer that the transaction was a loan, or a purchase? If the \$3000 was a loan to Giveans, the money would have been handed over to Giveans, and he would have paid it to the But the direct contrary was done. No part of plaintiffs. the \$3000 was in fact paid to Giveans, but, on the contrary, it was paid to the plaintiffs in execution. It was not the ordinary operation of borrower and lender. Where there is borrowing, the money passes from the lender to the borrower. Where there is a purchase, the money passes from the vendee to the vendor. Here the great fact done, to wit, the handing over of the money, was that of vendor and vendee, and not of lender and borrower.

There is also the evidence that, although the parties called this a loan, yet that the real object they were contemplating, was a sale and purchase.

Thus Robert A. Linn, says that Giveans came to him previous to the first day of sale, and asked him if he would assign if he got a man that would find the money. He told him he would. That a few days before the adjourned sale, Giveans came again to him, and stated he wanted him to go to Newton and receive the money and make the assignment. He said he had got the man to furnish the money. Linn told him he would send his son.

The whole transaction shows that this matter of the \$3000 was a purchase of the judgments, and not a loan to Giveans. If it had been a loan, the money would have passed to Giveans, and been his property, and gone to his benefit, and been appropriated as he, Giveans, saw fit, either to pay off the judgments, or to any other purpose his fancy or his interest might dictate. But the reverse of all this actually took place. The money was studiously and strictly kept from his

Not one cent of it passed into his hands. Not session. ent of it was appropriated to Giveans' benefit. off a farthing of the encumbrances against his property. never become his money. It went for the sole benefit of Murtry; he used it, and every cent of it, to purchase these gments, as he would have bought so many horses, not m Giveans, but from strangers. Giveans himself, instead demanding the money and putting it in his own pocketok, as he had a right to do if it was a loan, stood by and juiesced in the money being appropriated to procure the ignment of the judgments to McMurtry. Not a dollar of s \$3000 was used as a consideration for the mortgage. It went to purchase the judgments. The whole consideran of the mortgage was something different from the adncement of the \$3000. This transaction, therefore, of the 000, although loosely called sometimes a loan, had not, in nature, a single element of a loan, and even if everybody ould unite in calling it so, it could not change its elemental The whole of this \$3000, then, instead of being a n from McMurtry to Giveans, was appropriated towards rchasing the judgments and executions.

How then can the assignments be considered as collateral the mortgage? What would have taken place if the asnments had been collateral to the mortgage? The first ng would have been a loan of \$3000 to Giveans, which did take place; in the next place, a collateral must have in the property of Giveans, or under his control, but this called collateral was not the property of Giveans, or under control, but belonged to, and was under the control of the intiffs in execution, and sold by them to McMurtry. The ation of principal and collateral could not possibly exist ween the mortgage and the judgments. The assignments ald not possibly be collateral to the mortgage.

The contention of the complainant also assumes that the sideration of the mortgage was in fact a loan of \$3000, ereas the proof is, that the true consideration was not the 300, for not a dollar of it was paid or received on the

mortgage, but the true and only consideration of the mortgage to Giveans, was the postponement of the sale of his property under the levies, for three years.

The assignments of the judgments were valid. The transaction was a purchase and not a loan, and there is nothing whatever to weaken the binding force of the levies and excutions under these judgments, and for these reasons, as well as those named in the opinion of the Chancellor, I think the decree below should be affirmed.

The decree of the Chancellor was affirmed by the following vote:

For affirmance—Beasley, C. J., Bedle, Clement, Cornelison, Elmer, Fort, Kennedy, Van Dyke, Vail, Vredenburgh, Wales. 11.

For reversal—None.

WILLIAM H. POTTS, appellant, and THE NEW JERSEY ARMS AND ORDNANCE COMPANY and others, respondents.

A receiver, appointed by virtue of the "act to prevent frauds by incorporated companies," will not be authorised, as the law stands, to sell the real estate, clear of encumbrances, and to pay the proceeds into the court, but must sell, as sheriffs and other officers do, subject to encumbrances.*

Mr. B. Van Syckel and Mr. Browning, (with whom was Mr. E. T Green), for appellant.

^{*}By an act approved March 13th, 1866, receivers, appointed by virtue of "the act to prevent frauds, &c.," were authorized to sell the real estate, free of encumbrances, and under that act, the receiver in this case was directed so to sell the real estate which had come into his hands. The case is reported further, unte p. 395.

Mr. A. O. Zabriskie and Mr. J. T. Williams, (of New York), for respondents.

The opinion of the court was delivered by

ELMER, J. The Chancellor made an order in this cause, declaring the New Jersey Arms and Ordnance Company to be insolvent, and appointed a receiver, in pursuance of the statute entitled "An act to prevent frauds by incorporated companies," (Nix. Dig. 371.) The property of the company, consisting of real and personal estate, and some of it liable to deterioration, was subject to two mortgages, the fairness and obligation of which were called in question by the complainant's bill. It being the opinion of the receiver that he could only sell the property subject to the encumbrances, a petition was filed by the complainant, setting forth the proceedings on his original bill, and praying that the receiver may be ordered and decreed to sell and dispose of the said real and personal property, free and clear of the liens and encumbrances of the said two mortgages, and that the proceeds of said sale be paid into court, to await the decision of the matters before the court for adjudication, and abide the issue of the said suit of the petitioner. The Chancellor, being of opinion that such an order was not within the power of the court, and ought not to be made, decreed that the order applied for be refused and denied, without costs. From this decretal order the complainant has appealed, and the question which has been argued, and is now to be decided by this court, is whether the Chancellor has, by law, the power to make the order applied for.

It is manifest that the question turns on the construction of the statute, under which the proceedings were had. That statute confers upon the Chancellor the power to declare a corporation insolvent, and to appoint a receiver, who is to take possession of, and sell the property for the benefit of creditors. When a case is properly before him, he will, of course, proceed in all matters not regulated by the statute, according to the general principles of equity, applicable to

Vol. ii. 2 x

analogous cases; and had it been shown that such principles justified the order requested, and that nothing in the statute forbade it, he would, no doubt, have made the order, if the circumstances of the case required such a course. A court of admiralty, when proceeding in rem, so that all persons interested in the property are held to be parties and before the court, does exercise this power; but courts of equity have no such practice. In the case of Gihon v. The Bellville White Lead Company, 3 Halst. Ch. R. 531, it was held that a second mortgagee cannot sell the property clear of the encumbrance of the first mortgage, nor compel him to have a sale on his mortgage, without first paying him, or tendering him his money; and this is understood to be the established principle of the court. We must, therefore, look to the statute, to see whether this power is conferred in this particular case. The seventh section, (Nix. Dig. 373,) gives power to the

receiver to sue for, and collect debts, and to take and possess the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property of every description, belonging to the said company at the time of the insolvency, and to sell, convey, or assign, all the said real and personal estate, and to pay into the Court of Chancery, all the moneys and securities for money arising from such sales, to be disposed of under the order of the court, among the creditors of the com-The fifteenth section directs, that in the payment of the creditors, they shall be paid proportionably to the amount of their respective debts, excepting mortgage and judgment creditors, when the judgment has not been by confession for the purpose of preferring creditors. It is argued for the appellant, that these two sections, and especially the direction respecting the payment of mortgage and judgment creditors in the sixteenth, confers a general power on the receiver, to sell and make the money to pay them, in such manner as he may deem advisable, and of course on the court, to direct him accordingly.

It is clear, and could not be denied on the argument, that

the uniform policy of the laws of this state has always been, to require property, sold for the payment of debts, whether by virtue of executions, attachments, assignments, or orders of the Orphans Court, to be sold subject to all prior encumbrances, with the single exception of judgments upon which no execution has issued, which, by the express language of the statute, (Nix. Dig. 762, § 9,) are postponed in favor of executions first issued. There is certainly nothing in the act in question, which declares, in terms, any intention to depart from this policy; nor am I able to see that any such intention can safely be implied. The language of the seventh section, which authorizes the receiver to sell all the real and personal property of the corporation, is not stronger than the language of a statutory execution, or of an order of the Orphans Court. The exception in the fifteenth section, in regard to the distribution of the money received, among the mortgage and judgment creditors, was, no doubt, as the counsel on both sides agreed, copied from the first section of the act authorizing voluntary assignments, (Nix. Dig. 30,) which was prior in time. These words in that act, so long ago as 1838, were construed by the Supreme Court, in the case of Vanderveer v. Conover, 1 Harr. 490, to mean, not that the mortgage and judgment creditors should be preferred to the whole extent of their mortgage and judgment debts, but only that the old liens should remain unaffected by the assignment, a construction which has since been followed, and no reason appears why they should not have the same meaning in this statute.

In the case of Bell v. Fleming's ex'rs, 1 Beas. 490, it was held by this court, that an assignment does not impair a mortgage security, and that the mortgagee may interpose a claim for his debt, and also proceed on his mortgage so as to maintain his lien; departing in this respect from the practice of the English courts in cases of bankruptcy, who hold that if the mortgagee proves his debt, he must deliver up his mortgage for the benefit of the creditor.

The only case that has sanctioned the order asked for by

the petitioner, is that of Kelly v. The Neshanic Mining Company, 3 Halst. Ch. R. 579, which having been now expressly overruled by the case before us, the question comes, for the first time, before this court. It is to be remarked, too, that in the overruled case, the lien creditors appear to have been directly before the court, by means of bills filed by them, or otherwise, which is not the fact now, so that the appellant's counsel have been driven to contend, that all creditors are necessarily before the court, in the case of an insolvent corporation. Not being able to take this view of the case, and being of opinion that there is nothing in the act in question, which interferes with liens that exist when the insolvency occurs, or which authorizes a receiver to sell otherwise than subject to them, I think the order of the Chancellor, refusing the direction applied for, was correct.

Many cases may, no doubt, be imagined, where it would be greatly to the advantage of mortgage and judgment creditors, for the receiver to sell the property, clear of encumbrances; but if so, their consent can generally be obtained. Other creditors may often suffer by following the course marked out by our laws, and probably the case before us is one of that kind. However this may be, additional legislation is necessary before the law can be changed. The duty of the court is to apply the law as it exists, and not to attempt the introduction of new provisions, however desirable they may seem. The decree must be affirmed, but without costs.

The decree of the Chancellor was affirmed by the following vote:

For affirmance—Clement, Cornelison, Elmer, Fort, Haines, Van Dyke, Vail. 7.

For reversal—Kennedy, Vredenburgh, Wales. 3.

MARCH TERM, 1866.

ALEXANDER WHYTE, appellant, and WILLIAM H. ARTHUR and CHARLES S. WESTCOTT and others, respondents.

- 1. The well settled rule of law is, that where the equitable and legal estates unite in the same person, the equitable estate is merged in the legal.
- 2. A grantor or mortgagor cannot prove by parol, that his deed or mortgage was made in trust for the use and benefit of himself; such proof would be in contravention of the statute of frauds.
- 3. If the answer denies the trust, such trust must be proved by legal and competent testimony, though the answer does not set up the statute of frauds as a defence to the alleged trust.
- 4. For many purposes, an original and cross cause in chancery are considered as one suit, and ordinarily heard together, and the rights of all the parties, in respect to the matters litigated, are settled by one decree.
- 5. This court will presume that the pleadings in the court below, were as recited in the decree.
- 6. The answer of the defendant to the cross-bill, may be considered as substantially, and for all practical purposes, a replication to the defendant's answer to the original bill.

Mr. J. E. Cary, for appellant.

Mr. A. Mills and Mr. Vanatta, for respondents.

The opinion of the court was delivered by

DALRIMPLE, J. In April, 1862, Arthur and Westcott filed their bill of complaint in the Court of Chancery, against Alexander Whyte, to restrain him from committing waste on certain premises to which they claimed title, situate in the county of Morris. The defendant filed his answer, denying the right of the complainants to the relief sought, upon the ground that he was the equitable owner of the premises in question. He also filed a cross-bill, by which he prayed a decree for a conveyance to himself, by Arthur and Westcott of all their right, title, and interest in and to said premises.

The Court of Chancery decreed in favor of the complainants in the original bill, denied the relief sought by the complainant in the cross-bill, and dismissed the same with costs.

It appears by the pleadings and proofs before us, that on the 28th of September, 1859, Alexander Whyte, by a warranty deed with full covenants, conveyed for a valuable consideration, three certain lots of land, situate in the city of New York, to James Whyte; that some time afterwards, and prior to May, 1860, James Whyte sold and disposed of the same premises last mentioned, and received the consideration money therefor, and purchased therewith the premises in dispute, for which he received a deed from one Daniel Tillotson, on the 12th of May, 1860; that, on the 21st of February, 1861, James Whyte and wife conveyed the Morris county property to Alexander Whyte, by warranty deed, for the consideration of three thousand dollars, subject to a mortgage of six hundred dollars; that, on the same day last mentioned, Alexander Whyte executed a mortgage for twenty-two hundred dollars, to Emma Whyte, on the same premises; that, on the 3d day of October, 1861, Alexander Whyte and wife reconveyed these premises to James Whyte, by deed of warranty, subject to the said mortgages, and on the 31st of the same month of October, James Whyte and wife conveyed them to Arthur and Westcott, to whom Emma Whyte, on the same day, assigned her mortgage of twenty-two hundred dollars. Alexander Whyte continued the actual occupant of the premises so conveyed to, and reconveyed by him, up to the time of the filing of the original bill. The allegation of Alexander Whyte, the appellant, in this court, is that the premises in dispute were purchased for him, and with his money, by his son, James, of Daniel Tillotson, and that James thereupon held the property for him, as his trustee. He must maintain this proposition, or he has no standing in court. The money paid for the property, was the proceeds of the sale of the New York lots, to which James held an absolute fee simple title, at the time he sold and conveyed them. After carefully considering all the facts and circumstances, so fully and ably

presented to us by the counsel of the appellant, they fail to satisfy us that the consideration money received by James, on his sale and conveyance of those lots, in equity, belonged to the appellant. The burden of proof is upon him, and having failed to maintain the fundamental proposition of fact on which his whole right to relief rests, the prayer of his bill But assuming that James held the New must be denied. York property in trust for the appellant, and that when he sold it, the consideration in equity belonged to the appellant, and that the purchase by James, of the premises in dispute, with *that money, and the subsequent conveyance of these premises by him to the appellant, was an execution of the trust, the result to which we must come by the well settled rules of law, is that the equitable and legal estates uniting in the same person, the equitable estate was merged in the legal, and the appellant's title was full and complete. Having mortgaged the premises to Emma Whyte for twenty-two hundred dollars, he afterwards conveyed them to James, by a warranty deed in the usual form, and for a valuable money considera-His claim in this suit is, that this last mentioned conveyance to James, and mortgage to Emma, were made by him in trust for the use and benefit of himself, and undertakes to prove it by parol. This is in direct contravention of the statute of frauds, which enacts that "all declarations of trust or confidences of any lands, tenement, or hereditaments, shall be manifested and proved by some writing, signed by the party who is, or shall be, by law enabled to declare such trust, or by his or her last will in writing, or else they shall be utterly void, and of no effect." Nix. Dig. 330. Hutchinson v. Tindall, 2 Green's Ch. R. 357; Servis v. Nelson, 1 McCarter 100; Squire v. Harder, 1 Paige 494; Rathbun v. Rathbun, 6 Barb. S. C. R. 98; Law of Trusts and Trustees, by Tiffany & Bullard, 41, 42; Leman v. Whitley, 4 Russell

It was contended on the argument, that the defendants in the cross-bill, not having set up in their answer the defence of the statute of frauds, against the parol trust alleged,

waived it. We think not. The trust is denied. It must be proved by legal and competent testimony. Van Duyne v. Vreeland, 1 Beas. 150. The view we have taken of the case, renders it unnecessary to consider whether, as alleged by the appellant, the conveyance by James Whyte and wife to Arthur and Westcott, was procured by duress of imprisonment. The appellant cannot avail himself of that objection, if he had no title to the premises conveyed.

It is contended that the decree of the Chancellor is erroneous, so far forth as it grants the complainants the relief asked for in the original bill, because no replication was filed to the answer of the defendant to that bill, the evidence was not taken in that cause, and in fact, the hearing before the Chancellor was in the cross cause only. For many purposes, an original and cross cause in Chancery are considered as one suit, and ordinarily heard together, and the rights of all the parties, in respect to the matters litigated, are settled by one decree. Story's Eq. Pl., § 400, 401; 3. Daniell's Ch. Prac. 1751, 1752.

The decree before us is entitled in both causes, and recites that the case "came on to be heard upon bill, answer, replication, &c., in the original suit, and upon cross-bill, answer, replication, &c., in the cross suit." If this recital is not true, application should have been made to the Chancellor, to amend the decree according to the facts. This court must presume that the pleadings in the court below were as stated in the decree. The objection is purely technical. If, in fact, no replication was filed in the original cause, (the pleadings in which are not in the printed case,) and objection had been made before the Chancellor at the time of the argument, he would, undoubtedly, have given leave to file a replication nunc pro tune, and have made a formal order that both causes should be heard together upon the pleadings and Besides, the defendants' answer to the crossproofs on file. bill is substantially, and for all practical purposes, a replication to the defendant's answer to the original bill.

The decree must be affirmed with costs.

The decree of the Chancellor was affirmed by the following vote:

For affirmance—Beasley, C. J., Bedle, Clement, Cornelison, Dalrimple, Elmer, Haines, Kennedy, Vredenburgh, Wales, Woodhull. 11.

For reversal—None.

JUNE TERM, 1866.

NATHAN A. COOPER, appellant, and ELIZA CARLISLE and others, respondents.

- 1. It is settled, that in equity, part performance will, in certain cases, take contracts out of the provisions of the statute of frauds, requiring them to be made in writing.
- 2. Courts will not extend their exceptions further than established by decisions, but are disposed to enforce the statute as wise and salutary in its effects.
- 3. In order to take any contract out of the statute of frauds, by part performance, it is required: 1. That the parol agreement be clearly proved.

 2. That the contract be clear, definite, and certain. 3. That the contract and remedy be mutual. 4. That the complainant be not in laches, either in bringing suit, or offering to perform his part.
- 4. Unsupported parol evidence of conversations with a deceased person, made seventeen years after the conversations took place, is not satisfactory proof of a contract, to sustain a suit for specific performance.
- 5. The owner of lands along a stream above a dam, said, in conversation with a mill-wright engaged in raising the dam, that if the owner of the dam would pay him as he had paid H, he might overflow his whole farm. This was not an agreement to convey the right to overflow the land at the rate per acre paid to H.
- 6. Although it may be held in some cases that a unilateral contract, or contract by which one party is bound to convey, and the other not bound to purchase, may be made mutual by filing a bill offering to perform, so as to give a right to specific performance, yet on such contract, more prompt-

ness, both in offer to perform and in bringing suit, is required, than where the contract is mutual. A delay of fifteen years, or until the value of the property, or the rights of the parties, have materially changed, will barthe suit.

7. That the owner of lands above a dam, stands by and sees the dam raised without objection or protest, is not such acquiescence as will bind him, if he does nothing to induce or encourage such raising; especially, if at the time, he does not know whether it will cause his lands to be overflowed, or will be used by the owner for that purpose without first purchasing the right to overflow.

This was an appeal from a decree of the late Chancellor. The facts of the case appear in the opinion of the court.

Mr. Vanatta and Mr. McCarter, for appellant.

Mr. Pitney and Mr. C. Parker, for respondent.

The opinion of the court was delivered by

ZABRISKIE, C. The appellant, Nathan A. Cooper, filed his bill in Chancery, as complainant, against the respondents, for two objects: one of which was to compel the specific performance of a contract to convey lands, or an easement of overflowing them; the other to enjoin a suit at law, commenced by the respondents against him for overflowing land, and all future suits, on the ground that the overflowing was done, and the dam and works that caused it were erected, by the license and acquiescense of Thomas M. Carlisle, now deceased, from whom the respondents derive title, as devisees.

The case stated in the bill is this:

Nathan Cooper, in 1825, purchased a mill site on Black river, in the township of Chester, in the county of Morris, with mill-dam, and a saw and grist mill; in 1827 he rebuilt the mill, and in that year and in the year 1829, he raised the height of the dam as it stood until 1846. He died in 1834, having by will devised this mill property in fee to the complainant, his nephew. On the 24th of November, 1845, the complainant purchased of the heirs of Caleb Horton, de-

ceased, about nine acres of land on said river above his dam, which the owners for years before, had complained was wrongfully overflowed by reason of said dam being too high. The price paid was forty dollars per acre.

In 1846, the complainant repaired his mills, his tumbling dam, raceway trunk, and flume. The bill of complaint alleges that Vandoren, the complainant's mill-wright, suggested to him that it would be useful to raise the dam; that on consultation, it was thought that this might cause back-water upon a very little of the land of Thomas M. Carlisle. the complainant, for this reason, hesitated about raising the dam, lest it might overflow the land of Carlisle, who owned a farm on Black river, some distance above the dam. shortly afterwards, Carlisle came to the dam, where Vandoren was at work, and Vandoren said to him, "we talk of raising this dam some, and what if it causes the water to flow on your land?" to which Carlisle answered, that if Cooper would pay him as well as he paid the Horton's, he, (Cooper,) might That in a few days after this conversaflow all of his farm. tion, Vandoren told it to Cooper, and Cooper, believing from it that Carlisle had no objections to increasing the height of the dam, and that if he should, by raising the dam, overflow any of Carlisle's land, he would convey it to him at the rate of forty dollars an acre, consented that his mill-wright might raise the dam. This is the contract of which specific performance is sought, as set forth in the bill.

After this, while Vandoren was engaged in raising the dam, Carlisle came there and inquired how much he was going to raise the dam, to which Vandoren replied, that he would raise it the thickness of the stick of timber on which he was then working, the thickness of which was nine inches, and which Vandoren measured in Carlisle's presence, who did not object to the raising of the dam, or the proposed height of nine inches, but said "well, Cooper is good enough."

Carlisle saw the workmen raising the dam, in passing and repassing, and did not interfere or object: after it was raised, on several occasions, Carlisle asked the tenants of Cooper to

raise the floodgate of the dam, when the water in the river was high, so that he could gather his hay; this was requested as a favor, not demanded as a right.

The bill further alleges that Carlisle did not complain to Cooper of back-water on his land, though on one occasion he asked him to pay him something for injury done to his his land by the back-water, or to come and see about it, but in such manner that Cooper did not attend to it, and says in his bill, under oath, that he did not then remember it, but only had an indistinct recollection or impression of it, and that he had never otherwise heard or supposed that the dam caused any back-water upon, or damage to, Carlisle's That, after such consent, Cooper raised his dam not lands. more than nine inches, and placed new machinery in his mill, adapted to such increased height, and expended thus, from fifteen hundred to two thousand dollars. That after Carlisle's death, in 1855, and in the year 1857, Eliza Carlisle, his widow and devisee for life, told Cooper that the back-water was injuring her lands, and requested him to see about it. That he examined and found it was so, and entered into negotiations with her about it, which were continued without result, until January, 1861, for nearly six years, when she, with her children, who are the respondents, brought suit at law for the damage, which suit at law was restrained by the injunction in this cause.

The bill prays a perpetual injunction against suits for raising the dam, or damages by overflowing, and that the defendants may be compelled to convey to the complainant, Cooper, so much of the land as is overflowed by the dam as raised, or the right to overflow the same, upon his paying such compensation as, under the circumstances, shall be equitable and just.

The answer of the defendants denies, from information and belief, any agreement or consent by Thomas M. Carlisle, in his life, to convey the land, or to the raising of said dam, and sets forth frequent demands on the complainant for redress and compensation; and insists that, in answer to said demands, and in the negotiations about settlement, he

never set up or pretended that the dam was raised by agreement with or consent of T. M. Carlisle.

The complainant thus claims relief on two grounds. The first is that Carlisle made a contract with him to convey to him the lands which should be overflowed by the raising of his dam, at the price of forty dollars per acre; and that he, having expended money in part performance of that contract, by raising his dam and enlarging his works, is entitled to have the same performed, and to a conveyance of the land so overflowed, although the contract was not in writing. The second ground for relief is, that as the dam was erected and the works enlarged by the license, and with the knowledge and acquiescence of Carlisle, the license cannot now be revoked, and he is entitled to have a perpetual injunction against interfering with works erected with his knowledge and acquiescence.

It is now well settled that, notwithstanding the plain words of the statute of frauds, courts of equity will compel the specific performance of parol contracts, where they have been in part performed or executed, in cases where such part performance would work a fraud, if the contract was not fulfilled. 2 Story's Eq. Jur., § 759, 761; Fry on Spec. Perf., p. 174, § 383, &c.

The wisdom of the statute of frauds, in this respect, has been manifested by the many doubts and difficulties arising from this departure from it, and is further shown by the painful uncertainty of the parol evidence in this very case, and I fully agree with Chancellor Kent in his observations in *Phillips* v. *Thompson*, 1 *Johns*. Ch. R. 149. "This case, like many others, shows the great utility of the statute of frauds, and the danger of relaxing the sanction of its provisions; I agree with those wise and learned judges who have declared that the courts ought to make a stand against any further encroachment upon the statute, and not to go one step beyond the rules and precedents established." See also German v. Machin, 6 Paige 293; 1 Story's Eq. Jur., § 765.

Now, to this established doctrine of the courts of equity,

that part performance will take a parol contract to convey lands, out of the statute of frauds, there are certain limitations which are as well settled as the doctrine itself. willing to carry the doctrine beyond these established limitations. Among these it is established: 1. That the parol agreement must be clearly proved to the satisfaction of the court. Phillips v. Thompson, 1 Johns. Ch. R. 149; 1 Story's Eq. Jur., § 764; Smith v. Mc Veigh, 3 Stockt. 239. 2. The contract proved must be clear, definite, and certain, both as to its terms and subject matter. 1 Story's Eq. Jur., § 764; Ld. Stuart v. London & N. W. Railway Co., 1 De Gez, M. & G. 721. 3. That the contract and remedy in this, as in all other cases of specific performance, must be mutual. 1 Story's Eq. Jur., § 723; Fry on Spec. Perf., § 286; Benedict v. Lynch, 1 Johns. Ch. R. 370; German v. Machin, 6 Paige 288; Bronson v. Cahill, 4 McLean 19; Smith v. McVeigh, 3 Stockt. 239. 4. The complainant must not be guilty of laches, either in offering to perform his part or in bringing his suit. Fry on Spec. Perf., § 730; 1 Story's Eq. Jur., § 771; Milward v. Earl Thanet, 5 Vesey 720, (b); Eads v. Williams, 4 De Gex. M. & G. 691; Heaphy v. Hill, 2 Sim. & Stu. 29. With regard to the proof, the mere lapse of time where

With regard to the proof, the mere lapse of time where the contract is denied by the answer, as it is here, makes mere unsupported parol proof, taken seventeen years after the conversations to which it relates, unsatisfactory. Vandoren proves the conversation with him, as set forth in the bill, substantially, and that upon his telling Cooper what Carlisle had said, Cooper gave directions to go on with the work, and raise the dam. This conversation with Carlisle by Vandoren, is the contract on which the bill was filed, and, if we believe the statements in the bill sworn to by the complainant, and the evidence of Vandoren, it is the contract on which the dam was raised. Of this contract or conversation, it is enough to say, that it does not, in law or in equity, amount to a contract on which a suit can be based or defended. It is a mere statement by Carlisle, upon inquiry,

that he would be willing to sell the whole or part of his farm, at the price paid the Hortons. It proceeded no further, it was not even an unaccepted offer, and if the court was willing to grant relief upon a contract, proved by recollections of conversations at the end of seventeen years, this conversation amounts to no contract, and no relief could be given.

But another contract is attempted to be proved by James H. Douglas, made by conversations with him on different occasions about the time of repairing the dam. The contract is about the same subject matter, but it is a different contract. It might be sufficient to say with regard to it, that no relief could be granted on this contract, upon this bill. It is as if in a bill of foreclosure, a mortgage was set forth, void on its face, for usury, or want of stamp, or some other cause, and there should be offered in support of the bill another mortgage, of different date, payable at a different time, free from these defects, but given for the same money; it is clear, this would not be merely a variance but a different contract, and no relief could be had in that suit. But the relief in this suit would not be granted if the bill had set out the Douglas contract, because the court are not satisfied with the proof. is a contract, the efficacy of which depends entirely upon the accurate recollection by the witness, of the words of the conversations in which it was alleged to be made. It is proved by a witness, who was a mere tenant of the mill, who had been absent from the state for seven years, and from the premises much longer, and had had nothing to recall the affair to his memory. Few men could recollect a conversation at all, very few, I may say none, without a memory such as would constitute a prodigy, could remember it with any accuracy of detail, for this length of time, without the aid of some memorandum or other matter to refresh and support the memory. That he remembered several different conversations, which together supply precisely all that is necessary to make a contract, is suspicious, but alone would not be sufficient to impeach his credit. The fact that he was discovered and sworn on an accidental visit from the west, a year after

the complainant had seemingly rested his testimony, is suspicious, too, but may be explained. But besides the improbability of recollecting these conversations at this length of time, great doubt is thrown over this testimony by two facts; the first, which appears by the bill and the complainant's evidence, is this, that the complainant, at the complaints in Carlisle's life, and in the negotiations with his widow after his death, and above all, in his instruction to counsel at the filing of his bill, had forgotten that any such agreement was It appears to me impossible that Cooper could have forgotten it, if it had been made in the manner stated by Douglas, he, Cooper, having had continually, for years, so many complaints that would have recalled it to his mind. He went on negotiating about thirty dollars a year, entirely forgetting that he had a contract for the whole, at forty dollars per acre; he never once mentioned it before filing this The second fact is, that the defendant, Eliza Carlisle, never heard her husband in his lifetime, mention this agreement, though she heard him complain of the overflowing of the water, both to Cooper and in his absence; her answer on this is fairly responsive to the bill, and is evidence. The wife of a farmer of moderate circumstances, who has her husband's confidence, as Mrs. Carlisle had, judging from his will, is usually told of the bargains and changes made by her husband about the farm, and could in a case like this hardly forget it. We think it more probable that both these witnesses, and especially Douglas, in their efforts to recollect the particulars of conversations on a matter that they had doubtless heard talked of, by one or both parties, or at second hand, are mistaken, than that the complainant should have forgotten it for sixteen years, and Mrs. Carlisle entirely. Again, these two witnesses were present at the raising of the dam in 1846. Douglas swears that the sill of the dam was raised nine inches, and in this he is supported by Axtell, the mason who repaired the wall, and laid the stone on which that sill was then placed. Vandoren swears that the sill was

not raised, and in this he is supported by Crater, who helped

him put that sill in its place. This matter of fact, in which they all took part, and saw with their eyes, and which was the material fact in the alteration, witnesses would be expected to recollect, when they could not accurately remember conversations, or the words used in them; yet about this fact the two witnesses relied upon to prove the two contracts differ, and contradict each other. I have no doubt they differ in good faith, and that the one with Crater believes that the sill was not raised, and the other believes with Axtell that it was. But we cannot rely on either at this distance of time, to recollect with accuracy, a parol contract set up against the provisions of the statute of frauds.

Secondly: This contract is uncertain, both as to the price and as to the land. Vandoren says, as to the price, Cooper was to pay as well, or as liberal, as he had paid the Hortons for What does this mean? the same price per acre, their land. or the same price in proportion to the value? The most natural meaning of liberal would be the latter. Douglas says, "what he gave the Hortons for their land;" does this mean the same price per acre, or the same gross sum for the part wanted? A good argument might be made on either side of this question. The same uncertainty rests on the quantity of land; according to some of the witnesses, the dam was raised only nine inches; according to others it was raised much more, and some of the testimony would make it thirty-Was the contract to convey as much land as a raise of nine inches would overflow? or as much as the height to which he might then raise it, or prepare to raise it, would overflow? How much land did complainant overflow? The bill does not set it forth, or describe it, but intends to leave the court to grope after it, and find it out. And if the contract was not, on its face, uncertain as to its construction, and admitting, what is undoubtedly a correct and settled principle, that when the land is defined, the court will have the metes and bounds settled and ascertained, and the quantity calculated, yet in this case, from the uncertainty of the testimony as to what was the height of the dam in 1846, as used with loose

boards, and what was the height to which it was raised, it would be practically impossible to arrive at any satisfactory result as to the quantity overflowed.

As to the mutuality. By the agreement set forth in the bill and proved by Vandoren, the complainant was not bound to anything. By the contract, proved by Douglas, he agreed to pay for what he overflowed, but did not agree to overflow or purchase any. Upon the doctrine established in many cases, that an optional or unilateral contract is made mutual by the filing of the bill asking for a conveyance, the Douglas contract would be relieved from the want of mutuality, were it not that the bill does not settle or define how much land it accepts or offers pay for, and that the time elapsed before the filing of the bill, fifteen years, far exceeds the reasonable time allowed a purchaser to accept an optional contract.

But the laches of the complainant, both in offering to perform his part of the contract, and in filing his bill, is a full and complete bar to relief in equity, if there were no other. There is no reason given for the delay. The excuse offered that the complainant was too much engaged with other matters, is not only frivolous of itself, but the very offer shows that there was no other reason for the delay. It was a case that required prompt and immediate action; it was an unilateral contract, which, more than others, requires promptness; and the option, as to how much he would overflow by raising his dam, was with him. He knew whether the sill was raised nine inches, whether the cap piece was raised nine inches more, how wide were the boards on the old sill, and above all, of what width he intended to use boards on the It was his duty, as soon as he had fixed his dam new sill. as he wanted it, to ascertain by survey and accurate experiment, whether he raised the water at all, and, if any, how much, on Carlisle's land, and how much land he wanted. Had he delayed this a year, there might have been a question whether he was not too late. In other contracts, not so peculiarly optional and unilateral as this, two years' and three years' delay have been held too long. And in no case brought

to our attention, has a delay so long as this, where the contract on the part of the complainant was wholly unperformed, been overlooked, even with reasons accounting for it.

In this case, the complainant has waited until Carlisle, who made the contract, was dead. The answer was important his responsive oath would have neutralized and destroyed the testimony of Vandoren and Douglas, if he denied their alleged agreements. He has waited until the raising of the dam in 1829 has ripened into a right, and the starting point from which to measure the increase of overflow might be different. The value of land might be, and probably is, very different. And the evidence, by which it must be ascertained how much land is overflowed by the raising of the dam, is difficult to procure, and uncertain and unsatisfactory in its results.

The second ground on which the plaintiff seeks relief, (license and acquiescence on part of T. M. Carlisle,) cannot avail him here. The evidence, however uncertain, shows that the complainant inquired of Carlisle whether he would sell him the land, if it should turn out that the raising of the There was no license predam should overflow any of it. tended by the complainant's bill or evidence, except such as was included in a contract or offer to sell; it was not intended, nor was it in terms, a license to overflow Carlisle's The doctrine of acquiescence has no place in this cause; Carlisle saw the dam being raised, but did not, by his acts or silence, deceive the complainant as to his right to He did not, as the cases require to constitute acquiescence, encourage him in it, inducing him to think that he would not complain of any injury. On the contrary, he was made to believe that it was very doubtful if the raising of the dam would do him any injury, and that if it did, Cooper would pay a satisfactory compensation. To the raising of the dam, he had not the right to object; to the flowing of his land, he had; but he did not know that it would be overflowed by the raise of nine inches, nor does it appear that it was; Cooper alleges in his bill that he supposed, during the life of Carlisle, that "said dam did not do any damage to any of

the lands of said Thomas M. Carlisle." Under these circumstances, no acquiescence could bind.

We are of opinion that the appellant was not entitled to any relief, and that the decree of the Chancellor dismissing his bill, should be affirmed.

The decree was affirmed by the following vote:

For affirmance—The Chancellor, Bedle, Clement, Elmer, Haines, Vail, Vredenburgh, Wales, Wood. 9.

For reversal—Cornelison, Kennedy. 2.

In the matter of the application of John H. Anderson, guardian of William D. Thompson, an infant.

An appeal will not lie from an order of the Chancellor, refusing to order a special guardian appointed by him, to pay over the moneys derived from a sale of the minor's lands to the general guardian, in the mode authorized by the act of 1865, (Pamph. Laws 790); the power of the Chancellor in that respect being entirely discretionary.

Mr. Vanatta, for appellant.

Mr. Wilson, for respondent.

The opinion of the court was delivered by

THE CHIEF JUSTICE. The appellant is the general guardian of William D. Thompson, an infant, whose lands have been sold by order of the Chancellor, in pursuance of the act entitled "An act relative to the sale and disposition of the real estates of infants," (Nix. Dig. 359.) The moneys arising from this sale, at the time of the inception of these proceedings, were in the hands of the special guardian appointed in the Court of Chancery, and were invested in un-

questionable securities. In this posture of affairs, the appellant filed his petition in that court, seeking to have these funds transferred to him, as the general guardian of the minor, by force of the supplement to the act above referred to, approved April 5th, 1865, (Pamph. L. 790.) It is not denied that the appellant has conformed to all the requirements of this supplementary act, so as completely to qualify himself to be the legal custodian of the funds in question. The Chancellor, conceiving, apparently, that it was not for the interest of the infant to suffer these moneys to be removed from the supervision of a court of equity, refused to grant the application, and it is from this order that the present appeal has been taken.

Upon the argument before this court, on the part of the respondent, the point was raised whether the order thus drawn in question, is of a nature to which an appeal will lie.

As this objection touches the jurisdiction of this court, it becomes of course necessary to dispose of it, in limine.

The exception to the appellate power of this court in this case, proceeds on the assumption that, by the supplement of 1865, the appellant, upon a compliance with its provisions, did not entitle himself, as of right, to the fund in the Court of Chancery, but that the question of the retention of such fund in that court, or the transfer of it to him, was a matter confided by the legislature to the sound discretion of the Chancellor.

If this view of the authority of the Chancellor over the moneys in dispute be correct, there seems to be no doubt that the appeal in this case has been improvidently taken. An order or decree of the Court of Chancery, in a matter resting entirely in discretion, is not the proper subject of an appeal. The rule is much too well settled to justify the tedium of a superfluous argument in its support, but for the purpose of illustration of the extent of the doctrine, the following examples may be cited. Thus it has been held, that an appeal from a motion for a re-hearing will not lie. Williamson v. Hyer, 4 Wend. 172. Nor on a refusal to

vacate an order, that a bill be taken pro confesso. v. Van Benthuysen, 16 Wend, 382. Nor on the refusal of the court to remove an executor and appoint a receiver. Rogers v. Hosack's ex'rs, 18 Wend. 330. And the same principle was clearly admitted, and partly acted upon, in the cases of Garr v. Hill, 1 Halst. Ch. R. 641; and The Attorney-General v. City of Paterson, 1 Stockt. 625. of law upon this branch being therefore free from all uncertainty or obscurity, the only question we are called upon to decide is, as to the proper construction of the statute which has been already mentioned—I allude to the act of 1865. This is a supplement to the act which authorizes a sale of the infant's lands by a special guardian, appointed by the Court of Chancery, and it provides that, after such sale has been made, and such special guardian has performed the duties required of him, one of which is to invest, under the control of the court, the proceeds of the sale of such lands, to use the statutory language, "it shall be lawful for the Chancellor to make an order directing said guardian to pay the proceeds arising from the sale of said real estate, belonging to said infant, to the general guardian of said infant, if any such guardian has been appointed, upon the said general guardian giving bonds, &c." These are the terms in which is given the power to shift the funds from the hands of the special, to those of the general guardian; and the single problem is, do they confide a discretion to the Chan-It is not pretended that the words are mandatory; the intelligent counsel of the appellant would not press the argument to that excess; for it is obvious, in many cases it would be purely injurious to the interest of the infant, to remove the funds from the protection of the court. example, the personal estate under the control of the general guardian were ample for all the purposes of maintenance and education, there would seem little propriety, under ordinary circumstances, in transferring to him the proceeds of the real estate which, for all the purposes of inheritance, are, by the statute, made to preserve the qualities which they

possessed, prior to their transformation into personalty. This extreme point, therefore, was not claimed; but it was insisted that the discretion given to the Chancellor was not an arbitrary one, but was judicial in its character, and its exercise, in consequence, was liable to review. The obvious answer to this suggestion is, that all discretion confided to a court is judicial, and not arbitrary; and that the discretion exercised in this case, being possessed of no peculiarity, must be regulated by the common rule. It seems to me, that upon any admissible construction of the statute, no rational doubt can remain. The statutory concession is, it shall be lawful for the Chancellor to make the transfer; that is, whenever, in the exercise of a circumspect judgment, in his opinion, the interest of the infant will be promoted by the change, authority is conferred to cause it to be made. am at a loss to comprehend how any subject can be more simply a thing of discretion. Precedents, in coming to a determination, are not to be followed, and there is certainly no definite rule of law or equity which can be taken as a guide. Good sense and practical knowledge are alone to be consulted. If, at this time, this court should undertake to review the action of the court below in refusing the order in question, upon what principle could we proceed, except to decide the question involved according to the dictates of common sense; and this would be merely to substitute the discretion of this court for the discretion of the Chancellor.

My conclusion is, that the order in this case was a matter lying altogether in discretion, and is not, on that account, appealable.

Let the appeal be dismissed.

The appeal was dismissed by the following vote:

For dismissal—Beasley, C. J., Bedle, Clement, Cornelison, Dalrimple, Fort, Vail, Vredenburgh, Woodhull. 9.

Contra-Elmer, Haines, Kennedy. 3.

CATHARINE Howell and others, appellants, and JOSEPH N. TUTTLE, trustee, respondent.

- 1. The testator directed his trustees to pay over the income of his estate in three and one-eighth parts, to wit: one-third part to his daughter, C. H.; one-third part to his daughter, S. B., and one-third and one-eighth parts to his daughter, M. D. Held, that M. D. was entitled to one-eighth more of the whole cstate than either of her sisters, making ten twenty-fourths for M. D., and seven twenty-fourths for C. H. and S. B., each.
- 2. The testator also directed, in case of the death of either daughter, without children, that his trustees should pay the income arising from his estate, in the proportions aforesaid, to his surviving daughters, stating his intention that the share of such daughter should sink into, and constitute a part of his estate in the hands of his trustees, and the income arising therefrom, be divided among his surviving daughters in manner aforesaid. Held, that if C. H. should die without children, her share would be a part of the whole income, and M. D. entitled to one-eighth more of the whole than S. B., and not to one-eighth more of the whole, and one-eighth more besides, than S. B., of the share of C. H.
- 3. The same rules apply to the disposition of the principal sum under this will.

The opinion of the Chancellor is reported ante, p. 176.

Mr. J. P. Bradley, for appellants.

Mr. C. Parker, for respondent.

The opinion of the court was delivered by

BEDLE, J. The bill in this case was filed by the trustee, to ascertain the shares of principal and income, of certain legatees under the will of David Doremus, deceased. The testator bequeathed and devised to the complainant and William A. Myer, as trustees, (the said Myer having deceased, leaving the complainant the sole trustee), the residue of his personal and real estate, to receive the rents, issues, and profits of his real estate, and the interest and income of his personal estate, and in trust further, as follows: "To pay

over all the interest and income, rents, issues, and profits arising from my said estate, after deducting all legal charges on the same, in three and one-eighth parts, to wit: one-third part to my daughter, Catharine Howell; one-third part to my daughter, Sally Brogaw; and one-third and one-eighth parts to my daughter, Maria Duncan." The question arising upon this language, is as to the shares of each of the three daughters. In determining it, we must look for the intention of the testator, as gathered from these words, or taken in connection with other parts of the will. lants contend that Maria Duncan should not receive, as is claimed by her, one-eighth more of the whole than either of the other two daughters, but that the estate should be divided into three parts, in such way as that two of them will be equal to each other, and the other part exceed either of the two parts by one-eighth, the result of which would be eight twenty-fifths to Catharine Howell and Sally Brogaw, each, and nine twenty-fifths to Maria Duncan, making her share exceed either of the shares of her two sisters, by oneeighth thereof, or one twenty-fifth of the whole.

This construction, I think, cannot be sustained. The simple and natural construction is, that the testator intended that Maria should have one-eighth more of the whole estate than either of her sisters, and that although there were but three legatees, yet, as a mode of ascertaining their shares, and to give Maria the one-eighth more of the whole than the others, he intended that it should be divided into four parts, one of which parts should be one-eighth of the whole, and the other parts each one-third of the remainder, after deducting the one-eighth. He first divides the estate into three and oneeighth parts; that is, into three parts and one-eighth part, not into thirds of the whole, and one-eighth of the whole, as that would be impossible, but into such proportions as that there will be three parts and one-eighth part. The one-eighth part is particularly designated as one of the parts, and the other three parts are to be ascertained by dividing the residue, after deducting the one-eighth, into three parts.

division was merely intended to carry out the object of giving Maria one-eighth more of the whole, than either of the others. Taking, then, the estate as so divided into the four parts, viz. one-eighth of the whole, and the residue into three parts, the testator bequeathed the one-third part to Catharine and Sally each, using the term one-third part, to designate one of the parts into which the estate was divided, and not the one-third part of the whole estate; and after bequeathing one-third so designated, to each of the daughters, Catharine and Sally, there remained two other of the designated parts, viz. the one-third, and one-eighth parts, which he bequeathed to his daughter, Maria. It appears to me that this was a very easy and practical mode of ascertaining the shares of each, based upon the intention of allowing Maria to have one-eighth more of the whole estate, than the other In another part of the same item of the will, two legatees. wherein the testator directs his trustee, at the death of either of the daughters, leaving children, to pay over to such children the principal on which the parent received interest and income, he uses this language: "calculating the principal on the same basis as the interest is herein calculated, that is, onethird to each of my daughters, except my daughter Maria Duncan, whose share is to be one-third and one-eighth of principal as well as interest." The one-eighth is here used as a fractional part of the whole principal as well as interest, and the onethird as one of the designated parts, after deducting the one-This construction does no violence to the language. The view suggested by the appellants, would necessitate the insertion of words to show that the testator intended to refer the one-eighth to the other shares of Catharine and Sally, and to make it only the one-eighth more than either of them, instead of the entire principal and interest. I think, with the Chancellor, that if he had so intended, it would have been so expressed. Giving the will this construction, the share of Maria Duncan of the income, interest, rents, issues, and profits, would have been ten twenty-fourths, and the shares of Catharine Howell and Sally Brogaw, each, seven twenty-

fourths, and at the decease of each, leaving children, the principal of the estate, to which the children would be entitled, should be ascertained in the same proportions. So far, then, as these matters are concerned, the decree of the Chancellor should be affirmed.

But the decree proceeds further, and directs, "that upon the decease of the said Catharine Howell, without leaving lawful issue, if it shall happen in the lifetime of the said Sally Brogaw and Maria Duncan, the income arising from the share of the said Catharine Howell, shall be divided between the said Sally and Maria, in the proportions above mentioned, and at their decease, or in case the said Catharine survives the said Sally and Maria, at her decease, the remaining seven twenty-fourths of said trust estate shall be divided in like manner, between the children of the said Maria Duncan and Sally Brogaw." Catharine is a widow, without children; Maria and Sally each leave several, all of whom are parties in this cause. This part of the decree was made to cover the contingency of Catharine dying without issue. Should it be otherwise, of course, any decree made with reference to that contingency could have no effect. There is nothing in the opinion of the Chancellor referring to the disposition of the share of Catharine at her death. without children, and the decree was probably signed without the attention of the Chancellor being directly called to that part of it now in question. The decree upon this matter has reference to the share of Catharine, to wit, the seven twenty-fourths, and directs the income from it to be divided between Sally and Maria, "in the proportions above mentioned," the effect of which would be to divide the income of that share between Maria Duncan and Sally Brogaw, in the proportion of one-eighth more of it to Maria than to Sally. The operation of the decree, at the death of Catharine leaving no issue, and with her two sisters surviving, would be as follows: Maria would get ten twenty-fourths of the whole income, being her original proportion; Sally would get seven twenty-fourths, her original proportion; and of the remaining seven twenty-fourths, being the share of Catharine, each would take in the proportion of the first division, which

would give Maria the one-eighth more of it, than her sister. Instead of Maria, then, receiving only one-eighth more of the whole income than an equal share, she would have that one-eighth of the whole, and also the one-eighth of The same effect would also be pro-Catharine's share. duced, according to the decree, in the division of the principal between the children of Maria and Sally, after the death of Catharine, without issue. I do not think that the testator so intended. He meant to discriminate in favor of his daughter, Maria, and her children, to the extent of oneeighth more of the whole income and principal than the others, but not beyond it. At the death of either daughter, leaving no child or children, the testator directs that the share of such daughter shall sink into, and constitute a part of his estate in the hands of his trustees. Her share would then lose its distinctive character, and become a part of the residue of the estate, and the division then to be made, is not of the income of the share of such deceased daughter, without children, but of the whole residue of the estate. The leading idea of the testator, in that part of the will referring to this matter, appears to be, that the share of the daughter dying without lawful issue, should then be merged into his whole estate, and that no division should then be made of the income of that, as a share by itself, but that being 80 merged, the interest and income of the whole estate should be divided. The language is as follows: "And in trust, that upon the death of either of my said daughters, leaving no child or children, to pay the interest and income, rents, issues, and profits arising from my estate, in the proportions aforesaid, to my surviving daughters and daughter, it being my intention, that on the death of any daughter, leaving no child or children, the share of such daughter shall sink into, and constitue a part of my estate in the hands of my said trustees, and the interest and income arising therefrom, to be divided among my surviving daughters and daughter, in manner aforesaid." This language can scarcely admit of any other construction than as already given. The error of the decree is in dividing the share of Catharine as a distinct

share, instead of treating it as a part of the residue of the estate, and then dividing the whole income and principal according to the proportions named in the will.

What, then, are the proportions into which the whole income should be divided at the death of any daughter, leaving no children? The will says, "in the proportions aforesaid." The proportions of the shares of each daughter were equal, except that the share of Maria was not only as much as her sisters, each, but one-eighth more of the whole. Maria was to have oneeighth more of the whole, than either of her sisters. were the proportions of the three to each other. The proportions of Catharine and Sally were equal. The practical operation of the words, "in the proportious aforesaid," would be as follows: If Maria should die without leaving any children or their issue, but leaving Catharine and Sally surviving her, the share of Maria would sink into the estate, and the whole income would be divided between Sally and Catharine equally, because their proportions are equal. Catharine should die without any children or their issue, leaving Maria and Sally surviving, her share would sink into the estate, and the whole income would then be divided between them in the proportion of the one-eighth more of the whole to Maria than to Sally, because the proportion referred to between them, was one-eighth more of the whole to Maria than to Sally. In the event, then, of Catharine dying without leaving lawful issue, if it shall happen in the lifetime of Maria and Sally, as contemplated in the decree, the share of Catharine will become, or remain a part of the estate in the hands of the trustees, and Maria will be entitled to oneeighth more of the whole income than Sally, or the same result would follow by allowing Maria to take out of the whole income her original ten twenty-fourths, and Sally to take her original seven twenty-fourths, and then dividing the remaining seven twenty-fourths equally between the two. this course, Maria would get one-eighth more of the whole than Sally, and not that one-eighth an I the one-eighth of Catharine's share, addition il. This mo le of dividing the income

will also control in the division of the principal of the share of the daughter, dying without children. At the death of the parent, her children, if any, are entitled to the principal upon which the parent had received interest and income, and as stated in the will, "upon no construction of this clause in my will, shall the children of one deceased daughter have more than the children of another, except the children of my daughter, Maria Duncan, who shall have the one-eighth more, in manner aforesaid." In the event of Catharine dying without. issue, as provided for in the decree, leaving her two sisters surviving, the principal of her share would then be a part of the residue, and such residue of principal should be divided between the children of Maria and Sally, upon their death, so that the children of Maria would have the one-eighth more of the whole, than the children of Sally; the children of Maria would take just one-eighth more than the children of Sally, of the residue of principal. The same result would follow as in the division of the income, by allowing the children of Maria, at her death, to take the original ten twenty-fourths of the whole of their parent, and the children of Sally, at her death, to take the original seven twenty-fourths of the principal of their mother; and then dividing the remaining seven twenty-fourths of Catharine, equally between the children of the two, the children of each to take only among them, the share represented in the parent. By this mode, the children of Maria would get only one-eighth more than the children of Sally. If Catharine survives her two sisters, then, at her death, the division of her share, it then being the only part of the residue remaining, if Maria and Sally leave children, such share would then be divided between their children equally, for, at the death of Maria and Sally, their children would then have received or been entitled to the shares of their parents, respectively. And the share of the children of Maria, being ten twenty-fourths of the whole, would include the one-eighth of the whole more, which the testator intended they should have. The result of these conclusions is, that the whole decree must be affirmed, except

that part of it which provides for the disposition of the income and principal of the share of Catharine, in the event of her dying without leaving lawful issue, and as to that, the same must be reversed.

The decree of the Chancellor, except in the particular specified, was in all things affirmed; eleven of the judges concurring; not voting, three.

NOVEMBER TERM, 1866.

HENRY VANDERVEER, appellant, and CHARLES P. HOLCOMB and others, respondents,

- 1. In a court of equity, a decree may be made determining the rights of co-defendants in a controversy between themselves, in which the complainant has no interest; and semble, the party aggrieved, may appeal from such decree.
- 2. If, in a suit to foreclose a mortgage, the owner of the equity of redemption and a subsequent mortgagee are both defendants, and both answer, (the subsequent mortgagee setting up his mortgage, and asking that the amount due on it shall be paid,) and the owner admits the existence of the mortgage, but sets up that it is void for usury, the second mortgagee will be considered, as between him and the owner, the actor, and the owner will be permitted to set up and prove the usury, without offering to pay the amount advanced.
- 3. Where the cause is as it is here, and brought to hearing upon the evidence, the answer of the owner would not be evidence of the usury as against his co-defendant, the second mortgagee. The responsive allegations of an answer are evidence against the complainant, but never against a co-defendant.
- 4. Where a final hearing is had upon bill and answer only, by statute the answers must be taken as true, and where there is no contradiction, the allegations of the answer that sets up usury, must be taken as true. In such case, the remedy of the defendant, holding the mortgage alleged to be usurious, is by filing a cross-bill, or perhaps, by applying to the court for leave to take evidence on this point.

This was an appeal from an order of the late Chancellor, made upon the hearing, upon bill and answers. The opinion is reported ante, p. 87.

Mr. Ransom, for appellant.

Mr. Richey, for respondents.

The opinion of the court was delivered by

ZABRISKIE, C. Henry Vanderveer, the complainant below, filed his bill to foreclose a first mortgage on lands in Somerset; the validity of his mortgage and the amount due on it were not disputed by any of the defendants. He made defendants, Holcomb, the owner of the equity of redemption, and another, Henry Vanderveer, the appellant here, who held a third mortgage, together with the person holding the second mortgage, and other mortgagees and judgment creditors, subsequent to the third mortgage.

Holcomb filed an answer, admitting the complainant's mortgage, but denying the validity of the third mortgage, and setting up usury as a defence to it, and stating that he prayed no relief against it, or the defendant, Henry Vanderveer, in this suit, but only that no decree should be made against him, or the mortgaged premises, for the payment of it. More than fifty days after this answer, the defendant, Vanderveer, filed his answer, in which he set up the existence of his mortgage, but did not contradict, or in any wise notice the facts set up in the answer of Holcomb as constituting the usury, and prayed "that a decree may be made by the court, for a sale of the lands and premises in the foregoing mortgage mentioned, and set forth in the complainant's bill, and out of the moneys therefrom arising, that this defendant may be paid the full amount of principal and interest moneys so due to him as aforesaid."

No other defendant appeared or answered. The answer of Holcomb charged that the defendant, Vanderveer, had filed a bill in that court to foreclose his own mortgage, and upon

Holcomb's filing an answer setting up usury, had dismissed his own bill; and then by collusion, had procured the complainant to get an assignment of a mortgage which had been originally given to Cornelius Vanderveer, and to commence this suit on it, with the design of preventing Holcomb from setting up the usury by way of defence.

The complainant excepted to the allegations in Holcomb's answer, setting up the collusion and usury, as impertinent The Chancellor overruled the exceptions, and scandalous. and held that the allegation of collusion was not scandalous or impertinent; and that the allegation of usury was not impertinent, on the ground that one defendant has the right, in a bill of this nature, to contest the mortgage of another defendant, and that the Court of Chancery will and must, on the final hearing of the cause, decide the controversy between the co-defendants as to the subject matter of the suit; and that the defendant, Holcomb, in this case, had the right to set up the usury as against the defendant, Vanderveer, without offering to pay the amount advanced on the mortgage to him. That he was simply in the position of a defendant resisting a claim, and not of a suitor asking the exercise of the equitable power and jurisdiction of this court in his favor.

From this order overruling the exceptions no appeal was taken. It was made and filed November 14th, 1864, and no appeal can now be taken.

On the 27th of March, 1865, the cause was brought on for hearing, upon the bill and answers, and a decree was made adjudging that the complainant was entitled to the relief prayed for by his bill, and ordering a reference to a master, to take an account of what was due on the several incumbrances of the complainant and defendants, but not including among them the third mortgage held by the defendant, Henry Vanderveer. It does not mention that mortgage, nor adjudicate anything concerning it.

The appeal in this case is from that order, on the ground that it does not include that mortgage, and thereby effectually excludes the defendant, Vanderveer, from any share of the

proceeds of the sale of the mortgaged premises. Such may not be the effect of that order, but as it was no doubt the intention of it, and as it is upon that assumption that the argument before this court was had, it is proper that we should so consider of it.

Had this decree expressly adjudged, that the third mortgage was not a valid lien on the mortgaged premises, and that no part of the proceeds of the sale should be appropriated to the payment of it, the question would have been before the court. I shall consider the cause from that position.

In a court of equity, a decree may be made determining the rights of co-defendants in a controversy between themselves in which the complainant has no interest, when the question is brought before the court by the pleadings and proofs. Shannon v. Marselis, Saxt. 413; Ames v. Franklinite Co., 1 Beas. 66; Harris v. Ingledew, 4 P. W. 98; Chamley v. Ld. Dunsany, 2 Sch. & Lef. 710; Conry v. Caulfield, 2 Ball & Beatty 255; Elliott v. Pell, 1 Paige 263.

Such is constant practice in the Court of Chancery in this state, and this court, in *Hudnit & Slater* v. Nash, 1 C. E. Green, 550, assumed and proceeded upon that principle, and the decision of the Chancellor on the exceptions, which must stand as the law in that court in this case, is upon that very point. The allegations of usury were impertinent, unless the question raised by them could be determined in this cause.

This leaves us to consider whether the controversy was rightly determined. There are two questions: one, whether in the position in which the parties were before the court, the mortgage could be declared void for usury, unless Holcomb offered to pay the amount advanced; the other, whether there was any thing before the court, from which the fact that the contract was usurious could be adjudged.

It is a settled rule in equity, that a party who comes into court for equitable relief must do equity; and when the relief sought, is to set aside any instrument on account of usury, that he must offer to pay the amount really advanced on the

security which he seeks to avoid. But this rule is only applied to a party who seeks relief from the usurious obligation; it only operates when he applies for the aid of the court. For it is as well settled, that when usury is set up as a defence in equity, it will be enforced in the same manner as at law, and no obstacles will be interposed to the defence; though the court will grant no favor or indulgence, in setting it up, either in pleading it, or proving it.

If Holcomb had filed a bill, or a cross-bill, in this cause, asking to have the mortgage declared void or cancelled, he must have offered to pay. But if Vanderveer had filed a bill to foreclose, Holcomb, if he could prove the usury, could defeat the recovery of any part of the amount, as certainly in equity as he could at law. There has been an effort made by Vanderveer to put himself in the position to require Holcomb to tender the amount advanced, before he could avail himself of the defence. Perhaps we should not consider him unfavorably on that account. The rule in equity was adopted originally, to evade a provision of the statute, and Vanderveer was simply trying to evade that rule, made for the purpose of evading the usury act, he holding as the courts did, that although the forfeiture, as a penalty to enforce the law, might be expedient and right, yet the exaction of it by a debtor to avoid his just debt was unconscientious.

Had Vanderveer's mortgage been the first, he could have availed himself of the rule; he could have passively held his mortgage, until Holcomb's situation compelled him to ask relief in a court of equity, and then he would have received his money.

But he took a mortgage upon an equity of redemption. The first mortgage could at any time foreclose, and then he would be compelled to bring forward his mortgage, and set up his claim under it and prove it. This would compel him to be the actor. The form of his answer expressly places him in that position; he prays that the property may be sold, and he be paid. But aside from this, his position in the cause is

that of a mortgagee producing his mortgage to the court, and asking it to be paid out of the mortgaged premises.

Holcomb's position throughout, on the contrary, is that of a defendant. The complainant, to foreclose his own mortgage effectually, must make Vanderveer a defendant; and to do so, must in some terms set out this mortgage held by him, as an incumbrance or seeming incumbrance on the premises.

This compels the defendant, Holcomb, either to admit or deny that it is such incumbrance; he must here raise the defence, or permit it to be paid by the salf of his lands. He does not come into court asking relief of or by the court, but against the proceedings instituted in the court against him; it is both technically and really a defence, and only a defence, asking the court to keep their hands off him, or leave him alone as regards this mortgage.

This is in perfect accordance with the decision of this court in Hudnit & Slater v. Nash. In that case, the bill was filed by the second mortgagee, praying that the first mortgage should be declared void on account of usury. The owners of the equity of redemption, in their answer, set up the same defence, and prayed that the first mortgage should be declared void. Both asked the aid of the court to set aside that mortgage; and it is upon this ground that the decision of this court was placed, in the opinion delivered by Chancellor Green; and he observed, it was placing it upon the most technical ground, the very apices litigandi. The opinion of Chief Justice Whelpley, in the circuit, takes the same ground. And it may be fairly inferred from their reasoning, that neither would have extended his view so as to include the It is clearly not within their reasoning. present case. the other hand, the prayer above stated, in the answer of the defendant, Vanderveer, in this case, places him in the same position that Hudnit & Slater were in that case, by their answer, remarked upon by the Chancellor. He does not really submit to the proceedings of the complainant, his alleged confederate, but makes himself the actor, so far as can be done by an answer.

The next question is one of more difficulty. Had the Court of Chancery evidence of the facts constituting the usury for which this mortgage is adjudged void? The only evidence was the answer of the defendant, Holcomb. As to the fact of the existence of the mortgage, it is responsive to the bill; as to the facts constituting the usury, it is not responsive, and could not be evidence, even against the complainant. And it is a settled rule in equity, that the answer of one defendant cannot be evidence against a co-defendant. Gresley's Eq. Ev. 24; 1 Greenl. Ev., § 178; 2 Daniell's Ch. Pr. 838; Morse v. Royal, 12 Ves. 355; Clark's Ex'rs v. Van Riemsdyk, 9 Cranch 153; Judd v. Seaver, 8 Paige 548.

But the hearing being on bill and answer, without replication or proof, the statute fixes the effect of the answers. The thirty-eighth section of the act concerning the Court of Chancery, (Nix. Dig. 100,) provides that when a case is brought to hearing on bill and answer only, the answer shall be taken as true in all points. This applies as well to such parts as are not responsive to the bill, as to those that are; any new matter set up as a defence must be taken as true. The words of the statute are clear, and include the case of a co-defendant. There are here two answers; they do not contradict each other, and if both are taken as true, the defence of usury is established.

When answers contradict each other, no decree can be made under this section, and in that case relief could only be had by the complainant filing a replication to one or all of the answers, and taking testimony, or by a cross-bill, filed by one or more of the defendants for the same purpose; or perhaps, to suit its practice to the exigency of the case, the Court of Chancery would, in such case, order that the parties have leave to take and produce evidence. It is a proper case for a cross-bill. And in this case, as it stands, the defendant, Vanderveer, without denying the usury in his answer, could have had relief against the allegations in Holcomb's answer, by a cross-bill, and proofs thereon. This would give him the advantage of taking evidence upon the facts constituting the Vol. II.

usury, and obliging Holcomb to prove them, to which he is entitled, but he would not have the advantage of Holcomb's praying for the relief, an advantage to which he has no right.

But if the order appealed from (as I think, is in fact the case,) does not adjudicate upon, or determine the validity of the mortgage to the defendant, Vanderveer, but leaves it to be settled on the final hearing, upon coming in of the master's report, then there is no error in it by which the applicant is deprived of any right, and it cannot be reversed. In either case, the order appealed from must be affirmed.

The whole court concur in these views.

MARCH TERM, 1867.

JAMES B. STAATS and wife, appellants, and ZACCHEUS BERGEN and JAMES L. BERGEN, respondents.

- 1. A trustee will not be permitted to derive any profit from the use of the trust funds in his hands.
- 2. It is the universal rule, that a trustee must not put himself in a position in which he will be tempted, from the influence of self-interest, to take advantage of his ccs/ui que trust.
- 3. A purchase of land at a sheriff's sale, by a trustee, on a bill on a mortgage held by him in trust, his bid not being sufficient to pay off such mortgage, and the land sold being subject to two other mortgages in which the cestui que trust had an interest, will be declared, in equity, to enure to the benefit of the cestui que trust.

In the year 1840, Abraham I. Staats, father of the complainant, James B. Staats, died intestate, leaving, surviving him, his widow, Mary Staats, and three sons, who were his only children. By an agreement between the said widow and the sons, the sum of one thousand dollars was placed in

the hands of her brother, Zaccheus Bergen, the defendant, as

trustee, the interest of which was to be paid to her during her life, in lieu of dower, and after her decease, the principal was to be paid equally to her said three sons. receipt of this money, Mr. Bergen executed a declaration of trust, in conformity to the above arrangement. One third of this trust fund was subsequently loaned by the said defendant to James B. Staats, the complainant, who, to secure this loan, executed to Mr. Bergen, a mortgage upon his farm of about ninety-two acres, in Somerset county. In March. 1859, this farm, which was subject to other encumbrances, was sold by virtue of a foreclosure suit, and was purchased by one John A. Staats, who, in making payment of the purchase money, executed four mortgages on the farm, as follows, viz. one to William S. Cook, for \$1200; one to said Zaccheus Bergen, for \$333.33; one to P. P. Quick, for \$1000; and one to J. M. Mann, for \$800. The mortgages to Quick and Mann, were given to secure moneys which they respectively held in trust for the said Aletta Ann Staats, one of the com-After this arrangement, Mr. Bergen, still holding the last mentioned mortgage, executed in writing, a second declaration of trust, which is as follows, to wit: "This writing witnesseth that I, Zaccheus Bergen, of the township of Hillsborough, and county of Somerset, hold a bond and mortgage given by John A. Staats and his wife, on a farm in Bridgewater township, in said county, to secure the sum of \$333.33, with interest thereon, as trustee, to be appropriated by me to the support of Mary Staats, as far as may be necessary during her natural life, and to the payment of her funeral expenses; and within one year after her decease, I promise, and bind myself, my heirs, executors, and administrators, to pay the residue that may remain in my hands, to James B. Staats, of Newark, in the county of Essex, his heirs and assigns."

On the 9th of February, 1861, the interest in this trust fund was assigned by James B. Staats to his son, Abraham I. Staats, in trust for the said Aletta Ann Staats.

The above named J. M. Mann, having filed a bill to fore-

close the mortgage held by him as trustee of Mrs. Staats, as before mentioned, a decree was made to sell the farm, to raise the money due on the said four mortgages, in the order, and to the amounts following: first, William S. Cook, \$1363.06; second, Zaccheus Bergen, \$372.82; third, P. P. Quick, \$1203.34; fourth, J. M. Mann, trustee, &c., \$969.39; with interest on said sums from 28th March, 1861. Under an execution on this decree, the said farm was exposed to sale by the sheriff, on 27th May, 1861, and was struck off to said Zaccheus Bergen for \$1850, and the sheriff accordingly executed to him a deed for the property.

After the sale, Aletta Ann Staats requested Mr. Bergen to convey the farm to her, because, as she alleged, he had agreed to buy it for her at the sheriff's sale, and also because at such sale he was acting as trustee, and she was entitled to the moneys secured by the mortgage so held by him in trust, and to satisfy which, with other encumbrances, the farm was sold; she offering, if Mr. Bergen would convey to her, to repay him what he had paid for it, and something in addition for his trouble. Mr. Bergen refused, and claimed to hold the farm as his own, and afterwards conveyed an undivided half to his son, James L. Bergen, one of the defendants in this case, against whom the bill has been taken as

The prayer of the bill was, that the defendants might be decreed to convey the farm to the said Aletta Ann Staats, upon her paying to Z. Bergen the amount he had paid for it, or, if the court should deem it more equitable, that he might be compelled to pay her the said \$333.33, with interest.

The decree was, "that the complainant, Aletta Ann Staats, is entitled to have the farm and premises, with the appurtenances, mentioned and described in the said bill of complaint, conveyed to her by the said defendants, Zaccheus Bergen and James L. Bergen, upon paying to the said defendant, Zaccheus Bergen, the amount he gave for the said farm and premises, and such further sums as the defendants have expended in discharge of liens upon the same, or for repairs, or

proper or permanent improvements, and taxes, with interest, after deducting therefrom the rents, issues, and profits of said farm, since the purchase of the same by the said defendant, Zaccheus Bergen. And that it be referred, &c. See ante, p. 297.

Mr. E. W. Scudder, for appellants.

Mr. Ransom, for respondents.

The opinion of the court was delivered by

THE CHIEF JUSTICE. It will be observed from the narration of facts which precedes this opinion, that the defendant, Zaccheus Bergen, at the time he became the purchaser, at the sale by the sheriff, of the premises in question, held the second mortgage upon the land, as the trustee of Mrs. Staats, and that upon a bid made by him, of a sum which was not sufficient to pay such mortgage, together with the prior encumbrance, the farm was struck off to him. effect of such sale, therefore, on the rights of the cestui que trust, was to render valueless, so far as the land sold was concerned, not only the mortgage held for her by the defendant, but also the two subsequent mortgages, the equitable interest in which belonged to her; the one being for her benefit, in the hands of Mr. Mann, and the other, in those of Mr. Quick. Under these circumstances, it is insisted, that the defendant was not in a position in which he could lawfully purchase this property for his own benefit.

The general principles of equity touching this subject, though somewhat ventilated, were not seriously called in question in the discussions of counsel. It was assumed on the one side, and admitted on the other, that the general rule applicable to sales is, that if a trustee, or a person standing in any similar capacity, sell a trust estate, and become himself interested, either directly or indirectly, in the purchase, the cestui que trust is entitled, as of right, to have the property re o d, or, at his election, to acquiesce in the sale; and

that it makes no difference, in the application of the rule, that the sale was at a public auction, bona fide, or for a fair price. To this extent there was no controversy; but it was insisted, that this principle did not apply to the facts of the case before the court. The argument was that, in the present instance, the property which was sold, did not belong to the cestui que trust, and that, consequently, the defendant was free to make the purchase.

To adopt this theory, would be to abandon the principle upon which most of the adjudicated cases have been founded, merely on the ground that the circumstances of such cases differed somewhat from the facts before us. But we must look at the reason of the rule, and see if the present occasion is within such reason. The rule is one of public policy. The trustee is not prevented from bidding for property which he himself sells, on the ground simply of a supposition of actual fraud, but because the law has established, as an inflexible rule, applicable to every emergency, that he shall not place himself in a situation in which he will be tempted to take advantage of his cestui que trust. This is a wise public regulation, intended to protect a species of property, which, otherwise, would be constantly exposed to peculiar hazard. The trustee, therefore, must submit to this regulation, and if he does an act in violation of it, no matter how pure his intention may be, such act is voidable at the instance of the person whom he represents. "However innocent the purchase may be in the given case," says Chancellor Kent, in Davoue v. Fanning, 2 Johns. Ch. R. 260, "it is poisonous in its consequences. The cestui que trust is not bound to prove that the trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power, distinctly and clearly to show it. There may be fraud, as Lord Hardwicke observed, and the party not be able to prove it." At these sales, then, the trustee is forbidden to purchase, because his interest, as such purchaser, is opposed to the interest of his cestui que trust, and he acts, therefore, under a bias in his own favor. Nor does this rule

rest, to any considerable extent, in the fact that, in a particular line of cases, the trustee has peculiar opportunities for the practice of fraudulent acts, with regard to the property in his charge. The rule, to be efficacious, must be general, and the law implies, therefore, that in all cases of trusts, such opportunities may exist, and consequently the prohibition is universal, that he may not do anything which, while it is an advantage to himself, is, or may be, a loss to So jealous is the law upon this point, that the trust estate. a trustee may not put himself in a position, in which to be honest must be a strain upon him. The general rule, therefore, applies, not merely in those cases in which the confidence is absolutely betrayed, but when the circumstances are such that there was a temptation to violate it. Moore v. Moore, 4 Sandf. Ch. R. 37. I think, upon correct principle, a trustee, in no case, nor in any crisis, can become the purchaser of property, when the fact of his making such purchase, has a tendency to promote his own interest, at the expense of his cestui que trust. This, it is conceived, is the groundwork of the decisions, in England, and in this country.

Applying this test to the purchase in question, it is plain that it is invalid as against the complainant. As a bidder at the sheriff's vendue, the interest of the defendant was directly antagonistic to that of the complainant. A low price was the gain of the defendant, but it was, in the same ratio, a loss to the complainant. The property was struck off for a sum, not sufficient to pay the mortgage which it was the duty of the defendant to uphold and protect; he made money by defeating, in this transaction, that mortgage, pro tanto. Under the last declaration of trust executed by him, he appears, as it would seem, to be under no liability to make good the fund invested, if the security proved insufficient, so that his position, as a competitor at the sheriff's sale, was squarely opposite to his fiduciary duties. If he has made a profitable bargain, (and as he stremuously refuses to surrender his purchase, it is a fair presumption that he has done so,) the result has been attained by the sacrifice of the trust

As the guardian of the property of the complainant, fund. it was his duty to use every reasonable endeavor to make the land produce the largest price. Did he perform an obligation which it was an advantage to him to neglect? To omit the discharge of such duty was a fraud, in the eye of a court of conscience. "It is not enough," says the Chancellor, in the case of Whelpdale v. Cookson, 1 Ves., sen., 9, "for the trustee to say, you cannot prove any fraud, as it is in his own power to conceal it." The observation applies to every case of this strain, and to none more than to the one under consideration. To hold this transaction valid, as against the cestui que trust, would seriously impair the general principle of equity above enounced, which has been the guide to so many decisions, and which is so eminently essential to the preservation of a perfect integrity in the administration of trust estates.

The court is clearly of one mind, that the complainant is entitled to relief.

What that relief should be, has been a subject about which we have experienced more difficulty. The master who heard the case for the Chancellor, thought that the complainant had a right to take the bargain off the defendant's hands, and to be substituted in his place; and the court below accordingly decreed a conveyance.

It is now urged, by the counsel of the defendant, that such order was inequitable, and that all that the complainant is entitled to, in any event, is the money due upon her mortgage, with interest.

Under ordinary circumstances, perhaps, such a measure of reparation would answer every purpose. Such was the intimation in the opinion of Chancellor Walworth, in Van Epps v. Van Epps, 9 Paige 237, which, in many of its aspects, was strikingly similar to the present case. But an attentive observation of the peculiar attitude of the parties to this suit, at the time of the sheriff's sale of the property in question, will lead to the conclusion, that the mode of relief suggested would be defective, and entirely inadequate to the emergency. We are to assume that, in the view of equity, the defendant

Staats v. Bergen.

neglected his duty of trustee, in not making the property produce at the sale, its fair value; it was his interest to do this, and he is, therefore, to be charged with that result. On this assumption, then, it becomes probable that the cestui que trust was injured by such neglect, beyond the loss of the mortgage which he held for her in trust. The two subsequent encumbrances were held in trust for her, and, consequently, if, by secret acts favoring his personal ends, the trustee had the property struck off at an insufficient price, these encumbrances, in whole or in part, may, by this means, Nor, in this connection, should it have become worthless. be overlooked that, although the respondent was not the complainant in the foreclosure suit, he had a decree in his favor, and that the execution directed the sheriff to levy certain moneys for him, and that, consequently, he had a control, to some extent, over the place, time, and circumstances of the sale. The defendant, therefore, was in a situation, in some degree at least, to affect the proceeding of sale; he voluntarily placed himself in a state of repugnancy as to interest, to the complainant whom he represented, and he has no right to complain, if he is not permitted to retain a bargain which, it seems probable, has not only defeated the trust security in his own hands, but has had a like disastrous effect upon the two mortgages which were subsequent. we assume that the farm was really worth all these securities, then it becomes obvious that, if the law exacts but the payment of the one mortgage from the defendant, his misconduct, as a trustee, will be a source of considerable profit to him, and in an equal degree, a detriment to his cestui que trust. This result, it is conceived, is not consistent with the regulations before adverted to, established by law on grounds of public usefulness, to control the conduct of the trustee, and protect the rights of the cestui que trust. At this moment the defendant stands before the court, claiming the fruits of this bargain, which he has made in disregard and subversion of the interest of the complainant; if he had not infringed the rights of the complainant, he would not have acquired

Staats v. Bergen.

these fruits; it seems difficult to perceive any ground of equity upon which he can be permitted to retain them. But, besides this, when we look into the essence of the transaction of the vendue in question, we will perceive that in substance the defendant was purchasing, when he bought in the lands in question, the property of his cestui que trust. The farm was clearly encumbered to its full value, and the complainant was the owner of nearly two-thirds in value, of such encum-The legal interest of the mortgagor, therefore, was brances. but nominal, and the substantial interest which the defendant purchased, was the equitable rights of his own cestui que trust, and of those rights he became possessed by his purchase. They were sold in part by force of the decree in his favor as trustee, and in such a condition of affairs, it would seem to be clear, he ought not to be allowed to make a profit out of the speculation.

There is also another ground of objection to this claim of the defendant. The purchase in question, was made by the use of the mortgage which was in equity owned by the complainant. That mortgage the defendant could not lawfully use in his own concerns, so as to make a profit to himself. If a trustee use trust funds in the purchase of property, or in the transactions of business, it is a violation of his duty as trustee, and the profits of such purchase or business must enure to the benefit of his cestui que trust. It is the general rule, indispensably necessary to keep trustees in the line of their province, that they shall derive no advantage whatever from the administration of the property committed to their charge. So strictly is this disability maintained, that where trustees bought in a debt or encumbrance, to which the trust estate was liable, for a less sum than was actually due thereon, they were not allowed to take the benefit to themselves, but the other claimants had the advantage of it, and it was said that if there were no such claimants, it would go to the party entitled to the surplus. Robinson v. Pett, 3 P. W. 251, note A. "If trust money," says Lewin, using the language of the authorities, "be laid out by a trustee in buying and selling

Staats v. Bergen.

land, and a profit be made by the transaction, that shall go, not to the trustee who has so applied the money, but to the cestui que trust, whose money has been applied. So, where a trustee or executor, has used the fund committed to his care in stock speculations, though any loss must fall exclusively on himself, he must account to the trust estate for every farthing of the profit. If he lay out the trust money in a commercial adventure, as in buying or fitting out a vessel for a voyage, or put it in the trade of another person, from which he is to derive certain stipulated gains, or if he employ it himself, for the purposes of his own business, in all these cases he must account to the cestui que trust for the profits." Lewin on Trusts 289. A long series of uniform precedents sustain the universality of this rule; it never bends to circumstances, and is applied with inexorable severity, whenever a person occupying a relation which implies confidence, is entrusted with the safe keeping of the property of To make use of such property, except for the exclusive advantage of the party beneficially interested, is in itself a breach of trust, and it would be a violation of principle to suffer the trustee to take any gain from such misconduct. In the case now before the court, the trustee has made the mortgage which belongs to the complainant, an instrument whereby the farm, in which she had a large equitable interest, has become his property. All that the complainant asks is, that she may have the fruits of this bargain. We are of opinion that, under the peculiar circumstances of this case, such relief is proper.

Let the decree stand affirmed with costs.

The decree was affirmed by the following vote:

For affirmance—Beasley, C. J., Bedle, Dalrimple, Depue, Elmer, Fort, Kennedy, Vail, Vredenburgh, Wales, Woodhull. 11.

For reversal—CLEMENT. 1.

Lydia Emery, by her next friend, appellant, and Andrew G. Van Syckel, respondent.

- 1. The testator, in 1846, devised his farm to his daughter, Lydia, wife of N. E., during her natural life, and after her death, to her children, subject to certain charges, and also, if she should be dispossessed of the farm in any way or manner whatever, that his executors should take charge of her estate, and rent out the land to the best advantage, and pay over to her the rents and interest money yearly, and her receipt, and hers only, should be sufficient for the same. Held, that there was a legal estate in the wife, limited upon the contingency of dispossession, subject to the marital rights of the husband till then, but when that occurred, a trust estate began in the executors for the rest of the life of the wife, to her sole and separate use.
- 2. The husband alone obtained letters testamentary. Judgments were recovered against him by his creditors, and his interest in the farm was sold by the sheriff to Van Syckel; the court enjoined Van Syckel from proceeding in ejectment to recover possession, upon the ground that the dispossession, in equity, occurred at the delivery of the deed to Van Syckel, and that from that time N. E., the husband, was in possession, as trustee for the sole and separate use of the wife.

On the 4th of February, 1863, the Chancellor made a decree in the above stated cause, whereby it was ordered that the injunction theretofore issued, restraining proceedings at law, should be dissolved, and that the complainant's bill of complaint be dismissed, with costs; and that upon service upon the complainant, of a copy of this decree, and of the taxed bill of costs of the said defendant, Andrew G. Van Syckel, and upon demand and non-payment of the said costs, the said defendant be at liberty to apply for execution therefor, according to the practice of this court. From that decree the complainant has appealed.

Mr. Bird and Mr. G. A. Allen, for appellant.

Mr. Van Fleet and Mr. Van Syckel, for respondents.

The opinion of the court was delivered by

Bedle, J. The object of this bill is to restrain the defendant, Van Syckel, from proceeding in an action of ejectment,

now pending in the Supreme Court, to recover possession of a farm, and wood lot adjoining, devised to the complainant by George Apgar, her father, by his will, dated June 27th, 1846.

The testator died in 1846, leaving, him surviving, his widow,

Rhuhamah, and the complainant, Lydia, the wife of Nicholas Emery, who is his only child. In the year 1861, four several judgments were recovered at law against Nicholas Emery by his creditors, one of which was assigned to Van Syckel, and another was recovered in his own name. these judgments executions were issued, and by virtue thereof the right, title, interest, and estate of Nicholas Emery, in the lands so devised, were levied on and sold by the sheriff of Hunterdon county, to the defendant, Van Syckel, for the sum of seventeen dollars, a deed for which was made to him by the sheriff on the 16th day of June, 1862, and on the next day, the seventeenth day of June, the action of ejectment was commenced against Nicholas Emery, to recover posses-The widow and Lydia Emery were adsion of the lands. mitted as defendants in that action, by rule of the court. The general ground of relief claimed is, that, by the will, there is a separate equitable estate in the wife that cannot be reached by the creditors of the husband, and which it is the duty of a court of equity to protect. The will is very unskillfully drawn, and its construction is not without embar-The intention of the testator, so far as it may be gathered from the will, should govern, unless it violates some rule of law. A particular reference to the will, is necessary to an understanding of the question involved.

The testator first provides for his widow, by giving her an annuity of sixty dollars during her natural life, to be paid to her by his executors, provided she remains his widow, and directs his executors to place \$1000 at interest as a fund for its payment, the principal, with the interest remaining at the death or marriage of the widow, to become a part of the residue of his estate. He also gave to her the use and occupation of one-third of the dwelling-house and kitchen Vol. II.

during her natural life, provided she remained his widow. He next directed that his son-in-law, Nicholas Emery, and his daughter, Lydia, should "provide her with board during the same period, and with fire wood from off the farm, cut short for her fire-place or stove, if she desires it, free of all and every expense to her." He then gave her one-third of all the stock, and one-third of all the household and kitchen furniture, and a cupboard and contents, and further provided, "if, at any time, she should think proper to give up her part of the dwelling-house and kitchen, and take her board elsewhere, it is then my will, that my executors shall pay annually, out of my estate, the expense of her board and lodging. And I do hereby make my real estate liable therefor, so long as she remains my widow, and no longer. The aforesaid bequests are made in lieu of dower out of my estate."

The next bequest is to George Servis Emery, a grandson of testator, and a child of Lydia, of one thousand dollars, to be paid to him at the age of twenty-five years, and this is given, over and above his equal share in all the rest and residue of the estate; if he should die before attaining that age, the said legacy to become a part of the residue of the estate.

The will then gives to Lydia, all the testator's books, and the remaining two-thirds of the household and kitchen furniture, and live stock, and proceeds in the language following: "I also give and bequeath to my daughter, Lydia, for and during the term of her natural life, my farm, on which I now reside, containing two hundred and sixty-eight acres, more or less, with the wood lot adjoining, together with all the rest and residue of my estate, both real and personal, and after her death, I do give, devise, and bequeath the same to her children, to be equally divided among them, share and share alike, when her youngest child shall attain the age of twenty-one years, subject, nevertheless, to the payment of the annuity of sixty dollars bequeathed to my wife, Rhuhamah, and also the payment of the one thousand dollars bequeathed to my grandson, George Servis Emery; and for the sure and certain payment of the said bequest, I do hereby charge and

make liable the real estate bequeathed to my daughter, Lydia, and her children, for the payment thereof; should any of my grandchildren die before the youngest child shall attain the age of twenty-one years, and without lawful issue, it is my will that such share or shares shall descend to, and be divided equally among, the survivors, share and share If my daughter, Lydia, should die before the youngest child attains the age of twenty-one years, it is then my will that her husband shall have the use, occupation, and profits of my estate, until the said youngest child of my daughter, Lydia, shall attain the age of twenty-one years, as I do order and direct my executors to have the farm and buildings kept in good repair, and to see that no unnecessary waste or destruction of timber be committed on my said farm, or wood lot adjoining, and to carry this my last will and testament into effect, according to the true intent and meaning thereof. Fifth. It is my will, that if my daughter, Lydia, should be dispossessed of the farm in any way or manner whatever, in her lifetime, then I do order and direct my executors, or the survivor of them, to take charge of her estate, both real and personal, and rent out the land to the best advantage, and pay over to her the rents and interest money yearly, and every year, and her receipt, and hers only, shall be sufficient for the same."

The testator then gives to a black girl her freedom, a bed, bedding, chest, and one cow; also the sum of twenty-four dollars a year, so long as she will support herself without the assistance of that sum and no longer, to be paid to her yearly by his executors; and adds, "and for the certain payment thereof, my real estate is hereby charged and made liable."

The executors named in the will are Nicholas Emery, the son-in-law, and William Alpaugh. Alpaugh, it appears by the answer, has not taken upon himself any part of the administration of the estate, and letters testamentary were granted to Nicholas Emery alone.

What kind of an estate did the complainant take under that

will? Van Syckel, in his answer, sets up that Lydia took a life estate in the lands, which, by virtue of the marital relation, vested in the husband as a freehold estate, (the marriage having taken place, and the estate having been acquired previous to the act of 1852, for the better securing the property of married women). This view rests upon the language of the devise, without regard to the subsequent provisions. By itself, it would undoubtedly create a legal estate in the wife for her life, that would, by force of the marriage relation, become a freehold estate in the husband. But that general language is subject to the limitation contained in the fifth clause of the will.

The testator had but the one child; she was married when he made the will. He did not intend to interfere with the rights of the husband to use and enjoy the estate of the wife, except only so far as it was necessary to save that estate for her benefit, in case it became jeoparded through him. He was willing that the husband, as such, should be benefited by it as long as he could, but when he could not be, then he wanted it secured to her sole and separate use.

This intention, I think, is fairly gathered from the will. The testator, under the well settled rules of equity, could have made the life estate a sole and separate estate in his daughter, from the time of his death, and thereby have entirely cut off the marital rights of the husband in the same. Equity could protect such a devise against the creditors of the husband, and also the husband himself. It is also now settled that an estate over which a single woman would have the absolute control, while single, may be secured to her sole and separate use by the testator, against the control of any future husband.

The testator, having the whole power of disposition, so as to entirely prevent the husband from asserting any claim to the use or profits of the land, in right of his marriage, could, without violation of any rule of law, permit the husband to enjoy them up to a certain contingency, and then, by the creation of a separate estate, completely prevent him. Instead of giving to the wife a sole and separate estate from the tes-

tator's death, he has only provided that such an estate shall commence for her, upon the contingency of her being dispossessed. The life estate devised to her, is subject to be limited upon her being dispossessed, and a different estate is then created.

The fifth clause of the will limits the legal estate first devised to the wife, and also the enjoyment of the husband therein, by the act of dispossession. The simple intention of the testator was not to interfere with the husband, but to let him exercise all his marital rights until the estate was in peril by a dispossession, and then he meant that those rights should end, and the estate be secured to her exclusively. It would seem as if he thought that by leaving the estate in the power of the husband, there might possibly be a dispossession of the wife, and that he did not mean, when that occurred, that she should be deprived of his bounty.

We can well understand how the testator may have preferred to let the son-in-law and daughter enjoy the homestead together, without any abridgment of the husband's rights, as long as they could; how he may have wished that the husband should take the profits, as the husband naturally would, and ordinarily ought, and use them in the support of himself and family, without the possibility of any disturbance of the harmony between himself and wife, by the creation of an exclusive property in the wife; and also how, as a prudent man, looking to the comfort and sure sustenance of his only child with her children, and fearing that possibly she would some day, by acts and circumstances beyond her control, be turned out of her home, he may have desired, in view of such a contingency, and upon its happening, to secure to her the income of the land, independent of her husband and his creditors. The devise under this will, in its whole scope, secures these If the husband, either by his act of alienation, or through the action of creditors, caused his wife to be dispossessed, that would be the limit of any estate that he could The dispossession of the wife from these have any right in. premises, by any cause other than her own, fixed the limit of

any estate liable to such dispossession. He expected the daughter to live upon the farm, if she wished; that is apparent from the whole tenor of the will; and the word dispossession is used in reference to the farm, and if she could not live on it, she should have the benefit of it, while off.

There can be no valid objection against such a devise as

the testator has here made. The policy of the law, which prevents the absolute devise or bequest of property from being restrained by restrictions repugnant to the character of the estate, cannot be raised as an objection, for the testator has not endeavored here to create an absolute estate for life in the husband, with an attempt to restrict him in the power of disposal, which necessarily belongs to such an estate, but he gives to the wife an estate, which the husband can take by law, up to a certain time, depending on a contingency; and then his benefit in the devise ends. Neither is there any thing in the policy of the law, to prevent the limitation of such an estate as is here devised, upon a dispossession which may be occasioned by the act of alienation of the husband, or by his insolvency, or by his creditors in invitum. Such contingencies of limitation are now clearly recognized in cases

The most recent English case upon that subject, is that of Rochford v. Hackman, 9 Hare 474, where the authorities are fully referred to. The case of Bramhall v. Ferris, 4 Kernan 41, is also a strong case upon the same point.

of annuity, or other bequests.

In 1 Jarman on Wills, 823, the author uses this language: "But though a testator is not allowed to vest in the object of his bounty, an unalienable interest exempt from the operation of bankruptcy; yet there is no principle of law which forbids his giving a life interest in real or personal property, with a proviso, making it to cease on such an event." I see no reason why the same principle, that is so well settled in reference to annuities and other bequests, should not equally apply to the limitation of the enjoyment of real estate by the husband under his marital rights, upon such a contingency.

This, then, is the character of the interest that the husband

took, liable to be defeated by the dispossession referred to in the will. The estate of the wife was a legal estate up to that time, attaching itself to the husband. Upon the happening of the contingency, a different estate began; a trust estate in the executors for the remainder of the life of the wife, to her sole and separate use. The language of the will is, "then I do order and direct my executors, or the survivor of them, to take charge of her estate, both real and personal, and rent out the land to the best advantage, and pay over to her the rents and interest money, yearly, and every year, and her receipt, and hers only, shall be sufficient for the same."

If this was only a trust estate with the legal interest in the executors, for her use, without being a sole and separate use, it would be a trust that could not be reached by proceedings at law by creditors of the husband; their power to affect it to their benefit, would only be in the Court of Chancery, where the court could make a settlement upon the wife, and the creditors be benefited, subject to such settlement; but, if a trust to her sole and separate use, as it is, then the creditors of the husband could not reach it, even in the Court of Chancery. The separate estate of the wife, previous to the act of 1852, was purely a creature of a court of equity, and courts have gone far, and justly so, to aid in preserving estates for the wife and family, against the claims of the husband, or others through him. The general rule is, that no particular form of words is necessary to vest a separate estate in the wife, but the intention to give her such an interest in opposition to the legal rights of the husband, must be clear If it be plain from the language of the and unequivocal. instrument, or from all the circumstances disclosed in it, that the intention was to create a separate interest in the wife, this intention will be sustained and carried out. tion in the will, incompatible with the existence of the rights of the husband, will exclude him.

The English and American cases upon this subject, are mostly collected in the notes to *Hulme* v. *Tenant*, 1 *White & Tudor's Lead. Cas. in Eq.* 401. The technical words to create

such an estate are "to her sole and separate use," but are not necessary to be used.

In the case of Lee v. Prieaux, 3 Brown C. C. 381, the words, "their receipts in writing, respectively, shall be a sufficient discharge to my said trustee for the sum, or sums, so to be paid, &c.," were construed, that the wife should have the power to give a discharge, so as to bar the husband.

In Dixon v. Olnies, 2 Cox 413, the words were: "I devise and direct that the said bonds and mortgages be delivered up to my said niece, Lady Waltham, whenever she shall demand, or require the same." The Lord Chancellor said, "as these securities were to be given to Lady Waltham, on her demand, Lord Waltham could not have obtained them from the executors, without a demand made by Lady Waltham, which gave her the dominion over them, and they must therefore be considered as given to her separate use."

In Wagstaff v. Smith, 9 Ves. 520, the words "independent of her husband, or any future husband she may hereafter marry," and in Pritchard v. Ames, 1 Turn. & R. 222, the words "for her own use, and at her own disposal," were held to vest a separate estate.

In the case of Stanton v. Hall, 2 Russ. & M. 175, Lord Chancellor Brougham uses this language: "It was clear that no particular form of words was necessary in order to vest property in a married woman to her separate use. tention, although not expressed in terms, might still be inferred from the nature of the provisions annexed to the gift; as where, for example, the direction was that the property should be at the wife's own disposal, or that her receipts should be a good discharge; circumstances which raised a manifest implication that the marital right was meant to be excluded." And in the case of Tyler v. Lake, Ibid. 183, he says that the marital rights of the husband will be excluded where "the donor annexes some direction or condition to the gift, in a manner incompatible with the existence of the husband's right. Of this nature are the phrases 'to be at the wife's own disposal,' or 'to be enjoyed independent of the husband,' or

- 'her receipt to be a good discharge.'" The will or conveyance in these two cases, did not contain sufficient to raise a separate estate. Yet the court approved the doctrine as stated.
- These expressions of the Lord Chancellor are founded in authority, and no well considered case holds that he has gone too far. In the case of Blacklow v. Laws, 2 Hare 40, the Vice Chancellor evidently thought that the Lord Chancellor's application of the rule to the particular words of the will or conveyance, was not sufficiently liberal; that the marital right was protected by a too strict construction; yet

he felt obliged to follow the doctrine of those cases.

The words nearest analogous to those in this will, are in the case of Lee v. Prieaux, 3 Brown C. C. 311; "their receipts in writing, respectively, shall be a sufficient discharge." This decision was made in 1791, and its authority has not been shaken by any subsequent case. At the common law, the husband could take the legacy or trust, and receipt for it, and his receipt alone was necessary. The implication from the power given to her to discharge, was that she should bar her husband. The testator, in the case before us, directs that "her receipt, and hers only, shall be sufficient for the same." He intended that the trustees should, in no event, pay the rents to the husband; her receipt was their only discharge. Language could hardly be stronger, short of an express declaration showing that the husband was to be excluded from any rights in, or to them. The fact that the testator has created a trust after the dispossession, has also considerable meaning. It is a part of the very means provided to make the estate in the wife, different from what it was before the contingency.

In ordinary cases, the fact of an express trust would not have much bearing upon the character of the estate, for there can be a trust for the wife, to which the rights of the husband would attach; but when he permits the husband to enjoy till dispossession, and then changes the interest of the wife into a trust, it is some evidence that he did not intend

any risks to the estate after that, by any right of the husband. It is very clear to my mind, that the interest of the wife, guarded in the fifth clause of the will, is a sole and separate trust estate, peculiarly an object of the care and protection of a court of equity.

It has been suggested, that under this will the executors took the legal estate, as trustees, from the death of the testator.

Such a conclusion would prevent a court of law from disturbing it, and the relief prayed for in this bill would necessarily follow. But I am unable to discover from the will, any satisfactory evidence that the testator so intended. A legal estate in a trustee, may arise by necessary implication, and where the purposes of the will require it; but in this case, until dispossession, the language of this will is not sufficiently strong to require the legal estate to be in the trustees. It is certainly not given to them in express terms, and there is no duty required of them that makes it necessary for them to have it.

The annuity of \$60 to the widow, is only a charge upon the real estate. It is first provided for, by directing the executors to place out at interest \$1000 to raise it. Whether there was sufficient personal estate for that, does not appear. If there was, it was their duty first, to look to that; but if not, the real estate is only a security for it. And so the making of the real estate liable to pay the board and lodging of the widow, if she should give up her part of the house, creates only a charge upon it. It is true, that the will directs the annuity to be paid by the executors, also the board and lodging, yet these duties do not require, in any way, the The executors would be legal title for their performance. trustees of the fund or moneys necessary to make these payments, and would have power under the will, to raise, through the Court of Chancery, out of the real estate, such fund or money. No power of sale, or appropriation of the yearly proceeds of the land, to that end, is given to the executors by the will. The provision of \$24 a year to the black girl,

Phillis, is also of the same character, and is only a charge upon the real estate. The legacy to George Servis Emery, is not directed to be paid by the executors, but it is made a charge also upon the real estate. It is given upon the contingency of his arriving at the age of twenty-one years, and and if he should die before, and without lawful issue, it becomes a part of the residue of the estate.

It does not appear to me to be necessary that George should collect this legacy through the executors; but if so, it is only a charge of the amount to be made under the decree of chancery, out of the real estate. The executors being trustees to that end alone, and of the fund when raised, to pay it to George. The direction in the will for "the executors to have the farm and buildings kept in good repair, and to see that no unnecessary waste or destruction of timber be committed on my said farm, or wood lot adjoining, and to carry this my last will and testament into effect, according to the true intent and meaning thereof," could not, by any fair or necessary implication, vest in the executors any legal estate as trustees. When the trust estate commences upon dispossession, they then would have a legal estate for the benefit of the wife during the continuance of her interest, but before that occurs, this clause merely gives them a power to . make those in possession perform that duty. A tenant for life would be required by law to keep the farm and buildings in repair against permissive waste, and he could also be prevented from committing any unnecessary waste or destruction These were the objects intended, it appears to of timber. me, to be secured by that clause, and a power is given to the executors, as such, to see that they are carried out, and, if necessary, to compel it. No direction is given as to whether wood and timber shall be cut for that end, or any part of the land shall be sold, or whether the proceeds of the land shall This clause gives the executors a power bear the burden. which would enable them, for the benefit of those in remainder, to obtain the aid of a court to preserve the inheritance for them. Perhaps the executors would be justified

without the aid of a court, in having wood or timber cut to repair the buildings or fences. But whether that is so or not, it is not necessary to the full exercise of the power conferred in that clause, that any legal title should be in the executors. Such a view would be inconsistent with what appears to me to be the design of the testator, to secure the legal rights of the wife, and, consequently, those of the husband, undisturbed, until the happening of the contingency, which then creates a legal title in them, in trust for the wife. The language of the fifth clause, which directs the executors, or the survivor, when that contingency happens, "to take charge of her estate, and rent out the land," seems to be inconsistent with any legal title being in them as trustees before.

The trust, as a legal estate in the executors, lasts during the life of the wife, from the dispossession, and at her death ends; and if the husband survives, and the youngest child has not attained the age of twenty-one years, he takes "the use, occupation, and profits" till that occurs, giving him a legal estate during that period.

The only question remaining is, as to the relief prayed in the bill.

By the deed from the sheriff, the defendant, Van Syckel, acquired all the right, title, interest, and estate of Nicholas Emery, in and to the lands devised. Technically, the deed would carry with it the right in the purchaser, to the immediate possession, but the very instant such possession was transferred, the right of the executors as trustees, would The act of dispossession, and the commencement of accrue. the trust estate, would be instantaneous. At law, the result would be this: the purchaser would recover possession, and the trustees would be compelled to submit to the delay of a suit in ejectment, to recover the possession to them as trustees. This would be compelling the interest of the wife to bear an unnecessary burden in costs, and also to be prejudiced by the delays and incidents of a suit at law, which should be avoided, unless some substantial right of the purchaser was defeated by preventing it.

It may be said that the purchaser should be allowed to recover his judgment, in order for him to have a remedy for mesne profits from the date of his deed; but if he was permitted to recover those, it would be upon the idea that he was entitled to the possession from the date of the deed, and that the husband was a trespasser upon his rights of posses-This claim is inconsistent with any rights of the wife in the enjoyment of the estate during that time, and she would be virtually dispossessed, for whenever the rights of the husband cannot be exercised, without a dispossession of the wife, then the trust would in equity begin. If the purchaser had got into possession of the land at the date of his deed, he would have been decreed to account for the profits for her benefit. He could not get any benefit under his deed, either in the actual possession, or in the mesne profits after the date of the deed, that would not be founded upon a right to the exclusive possession of the land, both as against the husband and the wife. Whenever the estate of the husband was conveyed away by the sheriff, he had no further right to the possession as husband, and it was his duty instantly, as a trustee, to look out for the interests of the wife. Without the aid of a court of equity, he may have gone through the circuity of delivering possession, as husband, to the purchaser, and then, as trustee, recovering it back. Any holding on of possession after the deed, if not as trustee, was as a wrong doer, and without any right. The wife's interest, if not protected in the trust, would be merged in the possession of the husband, and, as a wrong doer, he would be liable to respond for the damages to the purchaser. This could not be, except upon the idea of a right of possession in the purchaser, and a dispossession of the husband and wife, as effectually as if the purchaser was in actual possession under the deed. Nicholas Emery, being both husband and executor, and a circuity of legal proceeding having only a tendency to injure and prejudice the separate estate of the wife, and the object being only to get the possession into the trustees at last, and Vol. II. 3 c

one being now in possession, and the only one who took out letters testamentary, equity will hold that the dispossession occurred at the delivery of the deed to Van Syckel, upon the principle, that that will be considered as done that ought to have been done, for it was the duty of Emery then to deliver the possession according to the deed; and upon the same principle, it will hold that the possession, of which the husband ought then to have been deprived, was delivered over by Van Syckel to the trustees, for, when he received possession, it was his instant duty to deliver it over to the trustees.

Under the very peculiar circumstances of this case, Emery will be considered in possession as trustee from the delivery of the deed. The contingency then, within the contemplation of the will, happened, and the trust estate for the sole and separate use of the wife began. Henceforward, during her life, she has such an estate. It being the duty of the Court of Chancery to protect it, the complainant is entitled to have the suit in ejectment enjoined, and the relief as prayed for in the bill. The decree should be reversed.

The decree was reversed by the following vote:

For reversal—Beasley, C. J., Bedle, Depue, Clement, Fort, Kennedy, Vredenburgh, Wales, Wood. 9.

For affirmance-None.



INDEX.

ACCIDENT.

will interfere to restore rights which have been lost by unavoidable accident. Brown v. 353 liott.

ACCOUNT.

See EXECUTOR, 3, 4, 5 PARTHERSHIP, 1, 2, 5.

ACQUIESCENCE.

See CONTRACT, 11.

ADMINISTRATION.

- neous, or recover the possession of property elsewhere. Normand's Adm'r v. Grognard, 425

 2. Where letters of administration are granted in different jurisdictions, the inventory of each administrator regularly includes only the property within the inventory. the property within the jurisdic-tion where his letters are granted, and for that property only he is accountable. Each administrator accountable. Each administrator must account for the property in 1. The rule is that if an executor, adhis hands, before the tribunal of ministrator, or trustee, negligently the state from which his authority
- 3. Where administration has been granted in the place of the domi-

poses of due administration in the place of the domicil, the mode of reaching it would be to require its transmission or distribution, after all claims against the foreign ad-ministration had been ascertained or settled.

- 4. The distribution of an intestate's property must be regulated by the law of his domicil. But by what tribunal that distribution shall be made, depends upon circumstances and rests in the sound discretion of the tribunal before which the acis brought for settlement. Where parties interested in the distribu-tion reside in the state where foreign administration is granted, the fund will be retained and distributed there.
- 1. In strictness, the grant of administrator, by virtue of a istration operates only within the jurisdiction where it is granted. It gives no legal right to collect debts, or recover the possession of the posse ters of administration upon the in-testate's property lying in a for-eign state, is required to file here an inventory of such property only as he is authorized to administer here; and for that alone will he be required to give security.

ADMINISTRATOR.

ministrator, or trustee, negligently suffer the trust moneys in his hands where administration has been granted in the place of the domicil of the intestate, and ancillary administration elsewhere for the purpose of collecting debts, if the fund in the hands of the foreign administrator is needed for the purpose.

counts, where there is no probability that he will be called on for early payment. Ib.
3. An administrator is not entitled to

a diminution in the legal rate of interest upon funds retained in his hands uninvested, on the ground that it would have been difficult to invest in his neighborhood small

sums, except at less than the legal rate. 4. Administrator allowed six months

from settlement of account for making investment, and charged with interest from that time to date of decree. 5. An administrator is entitled to no

commissions upon funds remaining in his hands after settlement of his account, where he has neglected to invest them, or has converted them to his own use.

See Administration, 2, 5.

ADULTERY.

See DIVORCE. EVIDENCE, 1.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

ALIENATION.

See Corporations, 6.

AMENDMENTS.

swer in a material matter, must be made upon notice, and be supported by affidavits. Huffman v. Hummer, 269'

mitted to be amended in a material

a supplemental answer containing the proposed amendment. Ib.

3. An application to amend an an-

swer is addressed to the discretion of the court. In mere matters of form, clerical mistakes or verbal inaccuracies, great indulgence is shown in allowing amendments, even in sworn answers. But ap-plications to amend in material facts, or to change essentially the

grounds taken in the original answer, are granted with great caution, and only where it is manifest that the purposes of substantial justice require it.

See Pleading, 10. PRACTICE, 4, 8, 9, 11 to 15.

ANNUITY. An annuity for which there is no con-

affection, save natural love and affection, and which the testator was under no legal obligation to pay, creates no charge upon the estate. The fact that it was paid by the testator for a long course of years and that he gave written in years, and that he gave written instructions to his agent for its punctual payment while in life, creates no legal or equitable obligation to continue it after his death. Executor of Kearney v.

See WILL, 2.

Kearney,

APPEAL.

See JURISDICTION, 4.

APPROPRIATION OF PROCEEDS OF SALE.

1. A motion to amend a sworn an- 1. No change in the mode of appropriating the proceeds of sale, speci-fically disposed of by decree and execution, can be made, except by opening and correcting the decree and altering the execution. This can only be done upon notice. serted therein. The amendment insust be made, by leaving the original in its present shape, and filing cipal, interest, and costs, according to his priority. It is immaterial whether the bill be filed by the first, last, or any intermediate encumbrancer.

ASSIGNOR AND ASSIGNEE.

See Assignment, 1, 4, 5. Covenants, 2, 3.

ASSIGNMENT.

1. An assignment by an executor, of his individual interest in a mortgage and decree belonging to the estate of his testator, such interest being only that of a general creditor of the estate, passes to the assignee no title to the mortgage, nor to the proceeds thereof. Chavez v.

Administrator of Peiffer, 257

2. A bond and mortgage is a chose in action, and as such may be assigned by mere delivery, and without writing, and the assignment, in equity, would be good. Galway v. Fullerton, 390

3. It is not necessary to the validity.

3. It is not necessary to the validity of an assignment of a mortgage by a firm, to secure a partnership debt, that it should be executed by all the members of the firm, though they were all joined by name,

mortgagees.

4. An assignment of a legacy passes the whole right of the assignor; after such assignment, there remains in the assignor no distinct, subsisting right, capable of being assigned.

Executors of Luse v.

5. Where a legatee has assigned a legacy for a valuable consideration, it is no defense to an action brought by such assignee against the executors to recover the legacy that they have paid it in good faith to a second assignee of the legatee, without notice of the previous assignment. No interest,

legatee, without notice of the session ment. No interest, legal or equitable, passes by the second assignment. But where, in point of fact, such payment was by note of one of the executors, given to the second assignee with full knowledge of the rights of the first which were occasioned by the neglector misrepresentations. Vrecland v. Van Horn, 137

assignee, the note was without consideration, and void; and, if paid at all, was paid in fraud of the rights of the first assignee, and constitutes no defense to his claim for the leg-

See TRUST AND TRUSTEE, 6, 9. USURY, 5.

AWARD.

The award which is the subject of ne award which is the subject of controversy in this cause, though omitting to decide a matter ex-pressly submitted to arbitration, yet having been accepted by the parties, and acts having been done to give it effect, must stand and to give it effect, must stand, and be performed in all things which are decided by it. Cross v. Cross.

BONA FIDE PURCHASER.

bona fide purchaser of land devised, without notice, cannot be affected by any equity subsisting between the executor of the estate and the devisee. Executor of Letson v. Letson,

See MARSHALING OF ASSETS, 4.

BURTHEN OF PROOF.

See Usury, 4.

CERTIFICATE OF STOCK.

See Transfer of Stock, 1. 2.

CESTUI QUE TRUST.

It does not lie in the mouth of a cestui que trust, while competent to judge of his own interest, to complain of acts as breaches of trust, which were occasioned by his own

CHATTEL MORTGAGE.

-1. The title of a mortgagee to chattels mortgaged, is absolute at law after forfeiture, and he may sell them for the satisfaction of his debt without the aid of a Court of Chancery.

Freeman v. Freeman,

44

2. A mortgagee of chattles may maintain an action at law for the conversion of the goods, although not in his actual possession. Ib.

3. A mortgagee has the right to come

into equity to obtain a foreclosure of the equity of redemption and a sale of the chattels, and also to protect the property from conversion or destruction until a sale be

4. If the mortgagee retain the chatdemption by the mortgagor. His only right to them is to satisfy his debt. When that is satisfied his title ceases

5. The conduct and fairness of a sale of chattels by the mortgagee or pledgee, and the rights acquired under such sale, are always open to investigation at the instance of the mortgagor or pledgor. A sale under judicial sanction is therefore safer, and where the amount is *Ib.*

safer, and where the amount is large, advisable.

6. The mortgagee has the right to foreclose his mortgage. He is not bound to incur the risk of selling the property without the sanction of a decree, and he may, it seems.

7. Where an injunction has been isto restrain a sale or removal of chattels mortgaged, and the pay-2, ment of the proceeds of sales al ready made to the plaintiff in execution if the mortgaged has a cution, if the mortgagee has assented to a sale of the chattles, and they have in fact all been sold, the injunction will not be continued to prevent their removal, or to restain the sheriff from paying over the proceeds.

1b. the proceeds.

soil, and comprehended in a mort-

gage of the realty, where it is the intention of the parties, as shown by the terms of the instrument, that the machinery should pass with and as a part of the freehold. Pott-v. New Jersey Arms and Ordnance Co.,

COMMISSIONS.

See Administrator. 5.

CONSTITUTIONAL LAW.

See CONTRACT, 4. CORPORATIONS, 5.

CONSTRUCTION.

written instrument must be construed according to the intent and meaning of the parties, as manifested by the instrument itself. Yet, where the construction is doubtful, the court may look into the surrounding circumstances, and avail itself of such light as they may afford in ascertaining the true meaning of the terms and language employed. Morris Canal and Banking Co. v. Matthiesen, 355

See DEED. WILL, passim.

the property without of a decree, and he may, it seems, come into a court of equity for the protection of his rights as mortages, even before a forfeiture has 1. Upon the completion of a contract for the sale of real estate, the vendor is deemed in equity, a truster for the purchaser of the land sold. Furce v. Dutcher, the land sold.

the purchase of real estate, and subsequently consents to a sale thereof by the agent of the vendor. upon the assurance that he shall receive a specified sum therefor, the estate of the vendor is liable in equity, for the value of the land to which the purchaser was equitably

entitled. The proceeds.

The registration of a chattel mort.

3. Equity will not, by the application gage is not necessary to pass the inof strict technical rules of law, deterest in machinery fixed to the clare void, contracts which have been fairly entered into, and where the ends of justice would be there-by defeated. Galway v. Fullerton.

4. The act of March 13th, 1866, investing the Court of Chancery with the power to order the property of an insolvent corporation. encumbered with mortgages or other liens, the legality of which is brought in question, &c., to be sold clear of encumbrances, is not in violation of the constitutional provision, forbidding the passage of a law in

bidding the passage of a law impairing the obligation of contracts, &c. Const., Art. IV., sec. VII. § 3. It neither impairs the obligation of contracts, nor deprives the creditor of any previously existing remedy.

Potts v. New Jersey Arms and Ord-

New Jersey Arms and Ord

nance Co.. 5. It is settled, that in equity, part performance will, in certain cases, take contracts out of the provisions of the statute of frauds, requiring

6. Courts will not extend their excep-tions further than established by decisions, but are disposed to en-

force the statute as wise and salutary in its effects. In order to take any contract out of the statute of frauds, by part performance, it is required: 1. That the parol agreement be clearly proved. 2. That the contract be

clear, definite, and certain. 3. That the contract and remedy be mutual.
4. That the complainant be not in laches, either in bringing suit, or offering to perform his part. Ib. 8. Unsupported parol evidence of con-

versations with a deceased person, made seventeen years after the con-versations took place, is not satisfactory proof of a contract, to sustain a suit for specific performance. *Ib.* 9. The owner of lands along a stream

The owner of lands along a stream above a dam, said, in conversation with a mill-wright engaged in raising the dam, that if the owner of the dam would pay him as he had paid II. he might overflow his whole farm. This was not an agreement to convey the right to overflow the land at the rate per acre paid to H.

Although it may be held in some

10. Although it may be held in some cases that a unilateral contract, or contract by which one party is

bound to convey, and the other not bound to purchase, may be made mutual by filing a bill offering to perform, so as to give a right to perform, so as to give a right to specific performance, yet on such contract, more promptness, both in offer to perform and in bringing suit, is required, than where the contract is mutual. A delay of fifteen years, or until the value of the property, or the rights of the parties, have materially changed, will bar the suit.

10. will bar the suit.

That the owner of lands above a dam, stands by and sees the dam

raised without objection or protest, is not such acquiescence as will bind him, if he does nothing to induce or encourage such raising; especially, if at the time, he does not know whether it will cause his lands to be overflown, or will be used by the owner for that purpose

without first purchasing the right to overflow. of the statute of trauds, required them to be made in writing. Coop to overflow.

525 12. The New Jersey Franklinite Company agreed with the firm of Ball & Company, that if the latter would contract to build a certain railroad, upon the basis of a stock subscription, and would subscribe for \$200, 000 worth of the stock of the railroad company for that purpose, they, the Franklinite Company, would convey as many shares of the stock as should be agreed upon by their president and Ball & Company, subject to the approval of the directors. Ball & Company subsequently entered into the con-contract, and subscribed for \$200, 000 worth of stock of the railroad company. The president of the Franklinite Company thereupon agreed to transfer 8000 shares of the stock of that company to Ball & Company. The action of the president was approved by the directors, and the stock transferred. The resolution of the directors was subsequently approved by the stock-holders. *Held*, that even if the road was never built, and the stock never paid for, and admitting that the Franklinite Company are enstitled in equity to a return of their stock, it does not in any wise im-pair the fairness or validity of the issue of the stock, or the legality of the election of directors chosen by votes given upon the stock thus issued. Savage v. Ball, 143

See PRACTICE, 5, 32. SPECIFIC PERFORMANCE. VENDOR AND PURCHASER.

CONTRIBUTION.

See Marshaling of Assets, 1, 2. PURCHASE.

CORPORATIONS.

1. A public nuisance must be occa sioned by acts done in violation of law. A work which is authorized by law cannot be a nuisance. Hinchman v. Paterson Horse Railroad Co.,

2. Whether the construction of a railroad in the street of a city, would operate beneficially or injuriously to the public right of way; whether it would prove a public benefit or a public nuisance, are questions to be determined by the legislature and by the city council. If the and by the city council. If the road prove an obstruction to the

road prove an obstruction to the street, and a public inconvenience and injury, it is not punishable as a nuisance, if constructed as prescribed by the charter.

3. In cases of unquestioned public nuisance, a court of equity will not interfere by injunction, except in cases of special and serious injury to the complainant, distinct from that suffered by the public at large.

large. 4. It is the settled law of this state,

that a railroad company authorized that a railroad company authorized to acquire lands for the use of their road by condemnation, and required to make payment or tender of compensation to the owner before occupying the land, cannot construct their road across or upon a highway, without making compensation to the owner of the soil occupied by the highway.

occupied by the highway.

occupied by the highway.

5. The building and operation of a horse railroad in the streets of a limitations, by authority of the legislature and of the city council, is a legitimate use of the highway, and an exercise of the public right council.

COVENANTS.

1. A lessee having made permanent improvements upon the demised premises under a covenant that he shall be repaid their appraised value at the expiration of the term, may seek relief in equity as well

of travel, and not a taking of private property for public use within the provision of the constitution.

6. The common law right of alienation by religious corporations, has not been restrained in this state by

not been restrained in this state by statute. Van Houten v. First Reformed Dutch Church, 128
7. The real and personal estate of a religious corporation is trust property, not to be controlled by the will of the cestuis que trust, much less by a bare majority of them, but by the trustees, the duly constituted guardians of the right and interests of the congregation. Ib. interests of the congregation. Ib.

 The Court of Chancery is vested with the same jurisdiction over corporate trusts that it ordinarily possesses and exercises over other trust estates. It will guard jeal-ously against any perversion of the trust funds by the corporation, and will hold the trustees personally responsible for a breach of the

See RELIGIOUS CORPORATION.

trust.

COSTS

Full costs will not be allowed a mortgagee upon his answer spun out by long recitals from the bill touching other encumbrances, for the mere purpose of admissions. Young v. Young. 161 Young,

See Appropriation of Proceeds of SALE. 2. EXECUTOR, 4.

LUNACY.

See PRACTICE, 18. TRUST AND TRUSTEE, 5.

COVENANTS.

The value of the imas at law provements constitutes an equit able lien upon the premises, which alone entitles the the party to re-Conover v. Smith, lief in equity.

2. If the lessee covenant for him and If the lessee covenant for him and his assigns, that they will make a new wall upon a part of the thing demised, it shall bind the assignee. But if the thing to be done, be merely collateral to the land, and doth not touch or concern the thing demised in any sort the assignee shall not be SALE, 1. sort, the assignee shall not be charged, though he be named in the covenant. The covenant is a the covenant. The covenant is mere personal covenant not affect ing the land demised.

3. A covenant by the lessor to pay his lessee the value of machinery, fixtures, and other necessary improvements, authorized to be substituted in the place of those al-ready in the buildings at the time of the lease, enures to the benefit of the assignee of the lessee, though the word "assigns" be omitted. Such improvements constitute an equitable lien upon the premises, which can be enforced only in this

court.

5. "What are usual covenants in deeds in a given locality" may be referred to a master.

1b.

CREDITORS.

See FRAUD. HUSBAND AND WIFE, 1, 4, 9. Injunction, 2. MARSHALING OF ASSETS, 5. l'artnership, 3. PRACTICE, 20.

CROSS-BILL

See PLEADING, 4, 6, 11. PRACTICE, 29.

DEBTOR AND CREDITOR.

See Injunction, 20. MARSHALING OF ASSETS. 2, 6.

DECLARATION OF TRUST.

SALE, 1. EVIDENCE, 19, 20. PLEADING, 5. PRACTICE, 23, 26, 30.

DEED.

1. By a deed of bargain and sale in the usual form, an estate was conveyed to the grantees, in trust to permit the grantor and his family, and the father of the grantor, dur-ing their lives respectively, to enjoy the estate and to take the rents and profits, and after their death, in trust to convey the premises to the son of the grantor, and "to such other lawful issue as the grantor may then have living, share and share alike, in fee simple, as soon as he or they arrive at age," Held— 4. Upon a contract for the conveyance of real estate by deed with "usual covenants," the grantee is entitled to covenants of seisin, of right to covenants of seisin, of right to convey against encumbrances, of convey against encumbrances, of conveyance, was in the conveyance, was in the conveyance, was in the conveyance.

quiet enjoyment, and of warranty.

Wilson v. Wood,

What are usual covenants in locality "may be locality"may be locality "ma fore the happening of the contin-gency upon which the legal estate was to be conveyed to him, viz. by the determination of the interven-

ing life estates.
Third. That the word "issue" in the conveyance in question, was synon-ymous with "descendants," and embraced the grandchildren of the grantor. Weehawken Ferry Co. v. grantor.

2. Where trusts and limitations are expressly declared in a deed, the same rules of construction must be applied to them as in cases of limitation of a legal estate.

See COVENANTS, 4 5.
TRUST AND TRUSTEE 2, 6, 7, 14.

DEMURRER.

See INTERPLEADER, 2. Pleading, 2, 3. PRACTICE, 1.

DESERTION.

See DIVORCE, 1.

DEVISE.

- 1. Every devise of real estate is, in does not apply to a term of years embraced in a general residuary clause. Under such circumstances,
- embraced in a general residuary clause. Under such circumstances, such term will be put on the foot of personalty with regard to the payment of debts. Shreve v Shreve.

 A devise to the widow, of an estate called Bellegrove, and the furniture, household goods, silver, books, paintings, statuary, and other works in the fine arts, there or elsewhere, during her natural life and widowhood, held to entitle her to use the goods for in her to use the content of the uninterrupted period of three years. Adams v. Adams, 324 Where, upon a bill for divorce, on the ground of adultery, the direct evidence, though insufficient of itself to support the charge, is sutting by the proved habits and character of the accused, as well as the strong probability of corroborative facts, the complexity of the uninterrupted period of three years. Adams v. Adams, 324 Where, upon a bill for divorce, on the ground of adultery, the direct evidence, though insufficient of itself to support the charge, is sutting by the proved habits and character of the uninterrupted period of three years. Adams v. Adams, 324 Where, upon a bill for divorce, on the ground of adultery, the direct evidence, though insufficient of itself to support the charge, is sutting to support the charge, is sufficient of itself to support the charge, is suffing the provided to a decrease of the provided to a decrease of th 2. A devise to the widow, of an estate called Bellegrove, and the furniture, household goods, silver, books, paintings, statuary, and other works in the fine arts, there or elsewhere, during her natural life and widowhood, held to entitle her to use the goods, &c., in her own or other person's house, or to let them out to hire, and that the estate in the land did not cease upon her failing to reside at Belle-
- 3. Held also, that the tenant for life, in such case, was only bound to make such repairs as should be necessary to prevent waste; and that if an insurance was considered desirable, the tenant for life and remainder man must insure their respective interest, as may be deemed most advisable. Ib.

Kearney v. Executor of

grove. *Krarney*,

4. The court declined to make any order respecting the payment of the taxes assessed, or to be assessed, on the property. Ib.

See WILL, 5, 6, 7.

DEVISEE.

See Bona Fide Purchaser. MARSHALING OF ASSETS, 2.

DISCOVERY.

See Pleading, 6. Practice, 10, 21, 33.

DISTRIBUTION.

See Administration, 4. PARTNERSHIP, 3.

DIVORCE.

1. Query. Whether desertion would be a valid plea to a bill for divorce, on the ground of adultery. But, admitting that it would, it is neces-sary that such desertion should ex-

Upon a bill for divorce, on the ground of adultery, the confessions of the defendant, made under cir-cumstances which exclude all sus-

picion of an attempt to fabricate evidence, and of any collusion between the parties to the suit, and sustained by facts irreconcilable with his innocence, will entitle the complainant to a decree. Jones v. Jones, 351

4. Upon a bill for divorce, on the ground of adultery, the complanant must not only show a decided preponderance of evidence in suppreponderance of evidence in sup-port of the charge, but must prove it to the satisfaction of the court, beyond a reasonable doubt. Berck-mans v. Berckmans, 453

DONATIO MORTIS CAUSA.

1. To constitute a donatio mortis causa. there must not only be a clear intention to give, but an actual delivery at the time of the alleged gift. Executors of Egerton v. Eger-2. The giving of one's promissory

note or acceptance by the donor to the donee, will not constitute a donatio mortis causa. It is otherwise with the gift of a note, acceptance, or bond of a third party, which may pass by endorsement or delivery.

DOWER.

- 1. An injunction will not lie by a widow to restrain commission of waste or other invasions of her rights upon land sold subject to her dower. She has a dequate rem-edy at law. Palmer v. Casperson.
- 2. Courts of equity exercise concurrent jurisdiction with courts of law in the assignment of dower. But they will not decide whether the widow is legally entitled to
- 3. If the title to dower is disputed the right must be established at law. For this purpose, the court may, and ordinarily will, either direct an issue or retain the bill, with liberty to the complainant to bring an action at law.

But whether, under such circumstances, the bill will or will not be 7. retained, is a matter resting in the sound discretion of the court. Ib. 5. A widow is entitled to dower in

wild or unimproved lands. Brown v. Richards, 32 6. If the land be sold under the mort-

gage, the value of the dower in woodland is ascertained by the

EQUITABLE LIEN.

See COVENANTS, 1, 3.

EVIDENCE.

1. To justify a decree for divorce, on the ground of adultery, the evidence of the defendant's guilt must be clear and satisfactory. A full and explicit denial of the charge by the defendant, and his alleged particeps criminis, should be regarded as decisive in a case of doubt. Reid v. Reid, 101 Testimony touching reputation, founded on opinions expressed post litem motam, is incompetent.

3. A stranger sent by a party to the neighborhood of a witness to learn his character, will not be permit-ted to testify as to the result of his inquiries. 4. Where the evidence is conflicting,

the extreme improbability of the fact alleged must be decisive of the unter of the parties die before the testimony on either side is taken, the evidence of the survivor is independent of the parties die before the testimony on either side is taken, the evidence of the survivor is independent of the survivor is independent. Lanning v. Adminisadmissible.

trator of Lanning, 228
6. But by the act of 1851, (Nix. Dig. 223, & 27.) the complainant in any action of an equitable nature, is a competent witness to disprove somuch of the defendant's answer as may be responsive to the allega-tions of the bill, even after the death of the defendant. The act of 1859 does not repeal this pro-

The enacting clause of the act of 1859 was designed to authorize the examination of parties to the record in cases in which their evidence was not previously admissible. The operation of the proviso must be limited to the cases in which the parties were rendered competent by the enacting clause.

woodland is ascertained by the same rule which is applicable in any other case.

Ib. 8. It is not necessary that the return should show that the officer before whom the commissioner was sworn, was duly authorized to administer an oath in the state where the commission was executed. All that the court requires is competent evidence of the authority of the officer to administer the oath. Lag-

9. It is no objection to the evidence of a non-resident witness, taken by virtue of a commission, that the witness is dead.

10. An oath by a commissioner to take depositions in a foreign state, "truly, faithfully, and without partiality, to take the examinations and depositions, &c.," is a material departure from the requirements of the statute, and the testi-mony taken before such commis-sioner is inadmissible. Ib.

11. Duties of commissioners defined.

12. It is necessary to the admissibility of testimony taken before a com-missioner, to show that all the requirements of the statute have been complied with.

13. A written agreement cannot be altered by cotemporaneous parol. In such cases, the instrument itself is the repository of the intention of the parties, and the only compe-tent evidence of what their intention was. Huffman v. Hummer, 269
14. The rule of evidence, that husbands and wives cannot be wit-

nesses for, or against each other, is independent of the question of interest. A husband cannot be a witness for his wife, even in a question touching only her separate estate.

Marshman v. Conklin, 282
15. A husband is not a competent

witness in a cause in which his wife is a party. Staats v. Bergen,

16. Witnesses of questionable character are to be relied on, in any judi cial proceeding, only so far as their testimony is intrinsically probable, or is corroborated by circumstances. Adams v. Adams,

17. The loss of an instrument upon which a party seeks to recover, may be proved by presumptive evidence Proof that the paper can not be found, due diligence having been used in searching for it, is sufficient to raise the presumption of loss, and let in evidence of its contents. Clark v. Hornbeck, 430 18. All that the law requires as a

ground for the admission of secondary evidence, is a reasonable assurance that evidence of a higher nature is not withheld or suppressed ■by the party offering it. 19. By force of the statute, (Nix. Dig. 102, § 56,) a decree directing a con-

veyance to be made, vests the estate, so that the rights of the parties, in case of a variance between the terms of the decree and of the conveyance, must depend upon the former rather than upon the latter. Such a decree must be construed by the same rules as would have been

the same rules as would have been applicable to a conveyance made in conformity to it. Weehawken Ferry Co. v. Sisson, 4.75

20. When a final decree in Chancery is complete in itself, its language being intelligible, the bill and answer cannot be read for the purpose of limiting its force and controlling of limiting its force and controlling its legal effect.

21. A grantor or mortgagor cannot prove by parol, that his deed or mortgage was made in trust for the use and benefit of himself; such proof would be in contravention of the statute of frauds. Whyte v.

22. If the answer denies the trust, such trust must be proved by legal and competent testimony, though the answer does not set up the statute of frauds as a defence to the alleged trust.

> See Contract, 8. Husband and Wife, 3, 7. PLEADING, 9. PRACTICE, 28. TRANSFER OF STOCK, 1. Usury, 2, 3, 4.

EXCEPTIONS.

n exception to a charge allowed by the Orphans Court not sustained, where, in the opinion of this court, an allowance of a part of the sum was warranted, but the preponderance of the evidence is not so decisive as to require a modification of the decree, Egerton v. Egerton, Executors of 419

EXECUTION.

Where the complainant in execution has become the purchaser of mort-gaged premises, at a sum less than the amount due upon the execution, the sale will not be opened and a re sale ordered, unless the petitioner will undertake, upon the re-sale, to bid the amount due upon the execution. *Hazard* v. *Hodges*, 123

See APPROPRIATION OF PROCEEDS OF SALE, 1.

EXECUTOR.

1. An oath made by a party to a claim against an estate, upon the state-ment of the executor that he would pay it if the claimant swore to it,

is voluntary and worthless. Exec utors of Egerton v. Egerton, 420 2. An executor will not be allowed a

charge against the estate, for services rendered in the lifetime of the testator, where the services ren-dered by the parties were mutually beneficial, and it is apparent that no pecuniary remuneration was ex-

pected or intended. Ib.

3. It is the duty of an executor, not only to exhibit his account for al-

lowance, but to use diligence in bringing it to a final settlement. Ib. 4. Decree of the Orphans Court charging the executors, individually, with the costs of suit, where they have permitted great and unwar-rantable delay in the final settle-ment of their account, approved.

5. An executor will be charged in his account with the amount of a note account with the amount of a notel against himself, set down in the inventory, and alleged to have been lost or destroyed by the testator in his lifetime, where the existence, amount, and loss of the note are satisfactorily proved, and where there are no circumstances sufficient to raise the areaumation, that the to raise the presumption that the note was intentionally destroyed by the testator. Clark v. Hornbrck, 1. Where it is clearly the intention of

See Administrator, 1. Trust and Trustee, 2.

FINAL HEARING.

Upon the final hearing, the material charges of the bill must be taken Force v. Dutcher, as true.

See Injunction, 23. Practice, 29.

FIXTURES.

Property, ordinarily treated as personal, is often annexed to and passes with the realty as fixtures, where Vol. 11.

it manifestly appears from the description and terms of the instru-ment, that such was the intention of the parties. Potts v. New Jersey Arms and Ordnance Co.,

FRAUD.

A conveyance, in view of future in-debtedness, and with an intent to place the property beyond the reach of creditors, is fraudulent as against creditors, and will be set aside. Cramer v. Reford, 367

See HUBBAND AND WIFE, 5.

GIFT.

To constitute a perfect gift, the donor must part with the possession and dominion of his property. And if the thing given be a chose in action, the law requires an assignment, or some equivalent instrument, and the transfer must be actually executed. Dilts v. Stevenson, 408

See HUSBAND AND WIFE, 7. INVENTORY, 3.

GRANT.

the parties to convey the whole estate, equity will decree a con-veyance of the fee according to the intention of the parties, notwith-standing the want of words of inheritance in the grant. Weller v Rolason 2. The established inference of law is, that a conveyance of land bounded

on a public highway carries with it the fee to the centre of the road, as part and parcel of the grant; and the grantee has the exclusive right to the soil subject to the right of way. Hinchman v. Paterson of way. Hinchma Horse Railroad Co.,

GUARDIAN.

See JURISDICTION, 4.

3 D

430

HIGHWAY.

1. The wife's earnings, and the avails v. Reford, 367

2. Real estate purchased with the wife's earnings, during coverture, belong to the husband, and is sub-ject to be taken for his debts. Ib

3. A husband cannot testify in favor of his wife in a civil suit in which

she is a party.

1b.

Where a wife's inheritance has been sold and conveyed by the husband and wife, and the proceeds have been used by the husband with the beautiful to the solution. band, without any contract with the wife for repayment, the wife, after the death of the husband, has no claim in equity upon the real estate of the husband, as against his creditors. Brown v. Brokerds.

against his creditors. Brown v. Richards, 32

5. Where a husband, in the transaction of his own business, assumes to deal in his wife's name, and upon the credit of her estate, her knowledge of the fact will not operate to charge her with participation in the fraud, nor her estate with liability for the indebtedness. So long as she abstains from active co-operation with him, her silence can raise no presumption that he acted as her agent, or by her authority. Lawrence v. Finch, 234

6. In order to charge the separate estate of the wife for debts contracted by the husband in his business, there must be clear and unequivocal evidence of her assent to that arrangement.

7. Gifts of chattels by the husband to the wife are void at law, though 2. The right of a party to an injuncthey may be sustained in equity. But even in equity, where a widow seeks to establish a gift from her husband in his lifetime, she must adduce evidence beyond suspicion, and nothing less will do than a clear irrevocable gift, either to some person as trustee, or by some

clear and distinct act of his, by which he divested himself of the See CORPORATIONS, 2, 4, 5.
GRANT, 2.

HUSBAND AND WIFE.

The wife's earnings, and the avails of her labor, during coverture, belong to her husband, and he cannot, as against his creditors, give, or agree to give, them to her. Crumer v. Reford,

367

which he divested himself of the property, and engaged to hold it as trustee for the separate use of his wife. Di'ts v. Securason, 407

8. The act for the better securing the property of matried women, confers no power on the wife to take real or personal project directly by gift from her husband. Ib.

To bring property claimed by the wife within the protection of the statute it must have been acourted statute, it must have been acquired by her in her own right, either before or after marriag. A purchase by her, or a mere gift by the hus-band to the wife, or a declaration by the husband that the property is hers, will not avail to defeat the claim of creditors or of the next

INFANT.

band.

of kin, after the death of the hus-

the allowance decreed by the court, and that the child should live with the father, and contribute to with the lather, and contribute to his support, denied; his pecuniary inability not being satisfactorily shown, and the character of his house being such as to render it improper that she should live there. Snover v. Snover, 55

See Jurisdiction, 4.

INJUNCTION.

1. Where the equity of the bill is not denied, or where the facts upon which the equity rests are admitted, but the answer sets up new matter in avoidance, the injunc-tion will not be dissolved or denied upon the answer alone. Society v. Low, 19

tion, or to its continuance, cannot be prejudiced or altered by the mere fact, that the case is heard upon the argument of the rule to show cause why an injunction should not issue, upon the complainant's motion, and not upon a motion to dissolve by the defend-

The defendant, in such case stands upon the same ground, and with the same rights, that he would upon a motion to dissolve. 3. A denial of the complainant's right,

upon an application for an injunc-tion, must be made upon the de-fendant's knowledge, and not upon

his belief or opinion.

1b.
Where a party seeks an injunction to restrain a violation of a cove-

his title to relief is not forfeited by long delay in making his ap-

plication. Ib. 5. If, under the circumstances, an in junction had been asked without

due notice that the complainant 13. insisted upon the performance of the covenant, the motion might have been resisted upon the ground

of surprise. 6. A judgment entered by confession upon a bond with warrant of atthe statute, (N. Diq. 97, 3 11.) requiring the defendant to give security before the issuing of an

injunction to stay proceedings at law in any personal action after verdict or judgment. Marlatt v.

Perrine, 49
7. Where an injunction is granted contrary to the statute the party is entitled to summary relief. He will not he put will not be put to his motion to

dissolve. 8. Injunction ordered to be set aside

with costs, unless complainant, within three days, deposit the money, or give the security required by the statute; in which event the injunction to stand. Ib.

event the injunction to stand. Ib.

9. Where the complainant's right is doubtful, and no irreparable injury will result, it is not a proper case for an injunction. Hinchman v. Puterson Horse Railroad Co., 76

10. Upon a bill for injunction, an allegation that the location of a street railread will inconvenience the complainant's business and diminish the value of his property, is material and significant, only where the road is constructed without authority, and the evil comout authority, and the evil com-plained of is a public nuisance, as

showing that the complainant has sustained special injury. Hogen-camp v. Paterson Harse Railroad Co., 11. But where the laying of the track

and the use of the road are authorized by the municipal authorized thorized by the municipal accountities, its location rests in the discretion of the corporation, or of those having the control and regution of the streets. It cannot affect

nant under a lease, and such covenant is a continuing covenant 12. A court of equity will interfere, running with the land, and its violation is of constant recurrence, lection of a public tax assessed upon the property of individuals, only where the bill contains some peculiar ground of equitable juris-diction. Hoagland v. Township of Delaware, Where the material charges of the

bill are fully denied by the answer, an injunction will not be granted, even though the bill disclose clear ground of equitable relief. Van Houten v. First Reformed Dutch Church. 127 Where A has given his note to

B, at the instance, and for the benefit of C, and in consideration thereof C has given his note to A, an injunction will not lie to re-strain proceedings at law by A upon C's note, on the ground that A's note to B has never been paid.

A's note to B has never been paid.

Savage v. Ball,

15. A denial by the defendant upon information and belief will not avail to dissolve the injunction.

He must answer upon his own knowledge. Irick v. Black,

190

16. Every one is a necessary party to a bill, whose joinder is necessary to the settlement of the complainant's rights. But a defect of parties is not necessarily a reason for dissolving the injunction.

16.

17. An injunction will not be dissolving the injunction. 17. An injunction will not be dis-

7. An injunction will not be dissolved as of course, even upon a full denial of the equity of the bill, if the court see good reason for retaining it. Its dissolution depends upon the sound discretion of the court.

1b. 18. An injunction will not lie to re-

strain proceedings at law upon a note in the hands of a bona fide holder, for valuable consideration, on the ground of fraudulent representations made by the payee to

the maker. Dougherty v. Scudder

19. Where the complainant's right is clear, and the infraction of that right establishet, he will not be to give security for such to give security for such the complainant to give security for such that remer may be given.

19. Where the complainant's right is for supposing that remer may be given.

19. Where the complainant's right is for supposing that remer may be given.

19. Where the complainant's right is given.

19. Where the complainant is given.

19. Where the complainant's right is given.

19. Where the complainant's right is given.

19. Where the complainant is given.

19. W required to give security for such damages as the defendant may sustain by reason of the injunction. Dodd v. Flavell, 255

2). Where the injunction deprives the defendant of the enjoyment of the property in dispute, and must and must prove greatly prejudicial to his in-terests, if his claim should be established, the complainant must prosecute the case with diligence. If laches or want of diligence on his part be shown, the injunction will be dissolved, or security remind quired.

quired.

A creditor at large, or before judgment, is not entitled to the interference of this court, by injunction,
the filing of the bill, so far modi-21. A creditor at large, or before judgference of this court, by injunction, to prevent his debtor from disposing of his property in fraud of the creditor. A bill filed by a creditor the of a firm, to restrain an execution creditor of an individual partner from enforcing his lien upon the partnership property, forms no exception to the general rule.

Mitt-

night v. Smith, 259
22. Where, upon a bill filed to compel the performance of a contract for the conveyance of real estate, an injunction issued to prevent the defendant from dealing with the property during the pendency of the suit, an objection that time is of the essence of the contract, will not avail the defendant upon a motion to dissolve the injunction.

Huffman v. Hummer, 263 263

23. Upon a motion to dissolve an injunction, the court will not undertake to determine points of doubt or difficulty upon which the merits of the case may depend, but will leave them to be determined at the final hearing, when the evidence is fully before the court. Ib.

21. When the answer admits the material allegations upon which the equity of the complainant's bill equity of the complainant's bill rests, but sets up new matter in avoidance, the injunction will not be dissolved.

1b.

25. It is not necessary to the contin-uance of an injunction, that it should be clear that the complain-

ant will succeed at the hearing. It is sufficient, if there is ground

his claim with all diligence. 27. Where the answer fully denies the equity of the bill, and is supported by the testimony, the injunction will be dissolved. Marsh.

man v. Conklin, 282 28. An injunction will not be dissolved as of course, even though the equity of the bill is denied by the answer. The court may, in

its discretion, retain the injunction until the hearing, if the circum-stances of the case, and justice between the parties, require it. Firm-

fied as to permit the defendant to proceed with his suit at law, but restraining him from setting up at the trial any other construction of the contract than that adopted by this court.

sive to the allegations of the bill, the injunction will be retained. Randall v. Morrell, Sec CHATTEL MORTGAGE, 7. Corporations, Partition, 2, 4.

PARTNERSHIP, 4. RELIGIOUS CORPORATION, 2.

INSOLVENCY.

The mere fact of the insolvency of a company does not of itself, render invalid or fraudulent a note given for a bona fide debt. Savage v. Ball,

> See SET-OFF, 2. PARTNERSHIP, 4.

INSOLVENT CORPORATION.

See CONTRACT, 4.

INSURANCE.

See DEVISE, 3. TENANT FOR LIFE, 1.

INTENTION.

See GRANT, 1.

INTEREST.

See LEGACY, 1, 2. WILL, 1.

INTERPLEADER.

1. A bill of interpleader is proper, only where the complainant has property or funds in his possession, or under control, to which there are two or more claimants, and the complainant is doubtful to which of the claimants the debt the conferring of equitable powers upon law common courts does or duty is due. It cannot be sus-tained where the complainant is obliged to admit, that as to either of the defendants, he is a wrong-doer. Mount Holly, Lumberton and Medford Turnpike Co. v. Fer-

2. The want of the affidavit to a bill of interpleader, denying collusion. constitutes a ground of demurrer, but it also may be taken advantage of at the hearing.

ISSUE.

See DEED, 1.

INVENTORY.

1. The inventory and appraisement prescribed by the acts of 1856 and 1860, (Nix. Dig. 273, 274.) operate as a substitute for the inventory and appraisement prescribed by the fourth section of the act of 1851, (Nix. Dig. 270.) and by the tenth section of the act of 1846, (Nix. Dig. 277.) Ditts v. Stevenson, the act of the Dilts v. Stevenson, 407

2. In all cases where the intestate dies, leaving a wife or child entitled to the benefit of the provisions of the acts of 1856 and 1860, (Wix. Dig. 273, 274), the intestate ventory must be made by apprais-

ers appointed by the surrogate, not selected by the administrator, who are to be sworn by him before enare to be sworn by him before entering upon the performance of their duties, and to execute their office in pursuance of the requirements of the act of 1856.

3. A promissory note taken in the name of the intestate, should not be omitted from the inventory upon the claim of the wife that it is hers, being in payment of the sale of a gift to her husband, Ib.

See Administration, 2, 5.

JUDGMENT CREDITOR.

See Marshaling of Assets, 4.

ers upon law common courts does not take away or abridge the jurisdiction of a court of equity. It constitutes simply a case of concurrent jurisdiction, where either tribunal may afford relief, at the option of the party aggrieved. Irick 190 Black,2. This court has the power to con-strue a written instrument upon a motion to dissolve, but it is a mat-

ter resting in the discretion of the court, to be exercised according to court, to be exercised according to nature and circumstances of each particular case. Morris Canal and Banking Co. v. Matthiesen, 385

3. But the power will not be exercised, when the ends of justice are more likely to be attained by deferring the construction till the final hearing.

4. An appeal will not lie from an order of the Chancellor, refusing to order a special guardian appointed

der of the Chancellor, refusing to order a special guardian appointed by him, to pay over the moneys derived from a sale of the minor's lands to the general guardian, in the mode authorized by the act of 1865, (Pamph. Laws, 790); the power of the Chancellor in that respect being entirely discretionary. In the matter of Anderson, 536

See Corporations, 8. Injunction, 12. Practice, 19.

LESSOR AND LESSEE.

See COVENANTS, 1, 2, 3.

LEGACY.

1. In the case of a legacy to a daughter of ten thousand dollars, "to be paid to her on her reaching the age of sixteen years; if, however, she die before that age, this legacy to become part of my residuary estate,"

1. When a decedent leaves a debt due held that the interest on the legacy should be paid to the child for her maintenance. Kearney v. executor Kearney,

of Kearney.

2. A legacy in the codicil of the same will to another daughter, of "five per annum, during hundred dollars per annum, during her natural life, to be paid to her quarterly in advance by my exec-utor, commencing with her attain-ing her fifteenth year," does not

authorize the payment of interest to the child. Ih.

See WILL, 1, 8.

LIS PENDENS.

In many cases, the court will interfere and preserve property in statu quo during the pendency of a suit in which the rights to it are to be decided, and that without expressing, and often without having the means of forming an opinion as to such rights. Huffman v. Hummer, 263

See Injunction, 22.

LOST NOTE.

See EVIDENCE, 17. EXECUTOR, 5. Presumptions, 2.

LUNACY.

A party prosecuting an inquisition of lunacy in good faith, will not be condemned in the costs of resisting the commission. In the matter of 5. The general rule is, that the right Curtis White,

MAINTENANCE.

See LEGACY, 1, 2. WILL, 2.

MARRIED WOMEN.

See HUSBAND AND WIFE. MORTGAGE, 7.

MARSHALING OF ASSETS.

by specialty, and the residuary fund been exhausted, there being neither lands descended, nor lands charged with debts, the general rule is, that the specific legacies and the land devised must contribute ratably to discharge such debt. Thomas v. Thomas, 356

2. But in case the decedent has secured such debt by way of mortgage on any part of the land devised, after the exhaustion of the general re-siduary fund, the devisee of the mortgaged land cannot call for contribution, either on the general or specific legatees. Ib.

3. A member of a building and loan association executed to it, as securi-

ty for a loan, a mortgage, and a collateral thereto, assigned overten shares of its stock of which he was the owner; subsequently he executed a mortgage on the same premises to H. and after that conveyed to him the mortgaged premises in fee.
Judgments were then obtained

against the mortgagor, and the ten shares of stock levied on. Held, that the equity which H. had acquired, as against the mortgagor, and the association, to have the assets so marshaled that the debt of the association should be paid primarily out of the ten shares of stock, could not be impaired or af-fected by the subsequent interven-tion of the judgment creditors. Herbert v. Mechanics Building and

Loan Association, 4. In the marshaling of assets, mere judgment creditors do not occupy the same vantage ground with bona fide purchasers for a valuable con-

Held-

sets of the debtor, is absolute against the debtor himself, and cannot be taken away by the subsequent action of other creditors.

See WILL, 11, 12, 13.

MERGER.

The well settled rule of law is, that where the equitable and legal es tates unite in the same person, the equitable estate is merged in the legal. Whyte v. Arthur, 521

MISJOINDER.

See Pleading, 2, 3,

MISTAKE

1. Equity will protect a party against a plain mistake in a written agree ment. Firmstone v. DeCamp, 309

2. Equity will correct a clear mistake in a written agreement, so as to conform to the understanding of the parties at the time of its execution.

> See PRACTICE, 11, 12. SALE.

MORTGAGE.

1. A widow joined with the heirs atlaw of her deceased husband in the law of her deceased husband in the execution of two mortgages to sat isfy a part of the indebtedness of his estate, pledging her individual interest in the lands of which he died seized, to the payment of that specific indebtedness. To secure the ar-law, alone, subsequently executed other mortgages upon the same real estate. By an arrangement between the executors and the subsequent mortgage, provided it is entirely optional with him whether to make further advances or not. sequent mortgagees, they were au thorized to enter upon the mortgaged premises, sell all the standing timber fit for market, receive the proceeds of sale, and appropri-ate them towards the payment of the mortgages in such proportions as might be agreed upon by the

mortgagees respectively. Under this agreement sales of timber were made to a large amount. By a subsequent arrangement between the first mortgagee (complainant in this suit) and the subsequent mortgagees, the proceeds of these sales were applied, not to the complainant's mortgage, which was executed by the widow, but to the subsequent mortgages, the holders thereof guaranteeing the payment of the complainant's mortgage.

The interest of the widow First. cannot be thus subjected to the encumbrance of the entire mortgage debt. It is liable only for the debt secured by the mortgages to the complainant, executed by herself. Beyond that, it is unencumbered. Second. The widow is entitled to have

the proceeds of the sale of the land, as though the entire net proceeds of the sale of the timber had been applied toward the satisfaction of the complainant's mortgage. Third To afford the widow the protec-

her claim for dower satisfied out of

tion to which she is entitled, and to secure to her the full value of the dower in the equity of redemption, it is necessary that the entire value of the timber cut upon the premises should be credited upon the mortgage to which she became a party. Brown v. Richards, 32

- 2. A mortgage given to secure future advances, duly registered, is good not only as against the mortgagor, but is entitled to priority over subsequent encumbrances, for all advances made prior to actual notice of the subsequent encumbrance
- prior mortgage, provided it is entirely optional with him whether to make further advances or not. 4. In suits for foreclosure and sale of
- mortgaged premises, each mortga-gee is entitled to be paid his prin-cipal, interest, and costs, according to his priority. It is immaterial to his priority. It is immaterial whether the bill be filed by the

own name for the foreclosure of his mortgage, to which the mort-gagor had set up the defence of usury, and by collusion with another mortgagee has caused a new suit to be instituted, and himself

suit to be instituted, and himself made defendant, has no right to object that he is made a party unnecessarily, or brought into court against his will, and is therefore entitled to a decree for the amount due upon his mortgage. Such mortgagee is in truth the actor, seeking under cover of the complainant's rights, to deprive the mortgager of the protection of the statute as against a usurious claim. Vanderagainst a usurious claim. Vanderveer v. Holcomb,

6. A mortgage, given by a member of a firm to the firm, is valid; it is in no sense a mortgage to himself. Galway v. Fullerton, 390
7. A mortgage, given by a married woman, upon her separate estate, acknowledged in conformity with the statute and joined in by the

the statute, and joined in by the husband, is a valid security, and will be enforced, both at law and in equity.

See Assignment, 1, 2, 3. MARSHALING OF ASSETS, 2. Usury, 1, 3, 4, 5.

MULTIFARIOUSNESS.

See PRACTICE, 21.

NEGOTIABLE PAPER.

See PRESUMPTIONS, 2.

NUISANCE.

See Corporations, 1, 2, 3.

OATH.

See EVIDENCE, 8, 10, EXECUTOR, 1.

first, last, or any intermediate encumbrancer. Lithauer v. Royle, 40
5. A mortgagee, who has dismissed a bill which he had exhibited in his wherever it concerns a third person who had a previous right to the act, or had paid a valuable consideration for it. Savage v. Ball.

OBDINANCE.

1. The ordinance of the city of Camden, "authorizing and regulating the erection and building of party wall," is not repugnant to the constitution of the United States, or of this State. The land is not taken for public use. Hunt v. Ambruster. 208 bruster. 2. Under that ordinance, the right to compensation for the use of a party wall enurse not to the owner of the wall enures not to the owner of the building at the time of erection, but to the owner at the time the party wall is used for the purpose of building on the adjoining lot. It is not a personal claim of the grantor, but a right annexed to, and which passes with the ownership of the building to the grantee.

1b.

PARTIES

To a common bill for the specific performance of a contract of sale, the parties to the contract are the only proper parties. Bacot v. Wetmore

> See Injunction, 16. Partition, 1.
> Practice, 1, 2, 3, 21, 30.
> Trust and Trustee, 13.

> > PASSAIC RIVER.

See RIPARIAN PROPRIETORS.

PARTITION.

1. Encumbrancers are not necessary parties to a bill for partition. Low . Holmes 2. Upon a bill for partition of chattels

by a tenant against his co-tenant, and to restrain him from removing or using the same, or committing

any waste thereon, the claim of a 2. Upon a bill filed to settle the acthird party upon the property by lished by affidavit in opposition to the claim of the bill, upon a pre-liminary application for an injunc-tion. The alleged fact constitutes

no valid objection to the granting of the injunction.

3. Upon a bill for partition by Iδ one tenant in common against another, where the facts constitute a clear case of the use and employment of

the property, to the entire exclu-

4. Order: that the defendant within ten days from the service of a copy thereof, give bond, with security, to the complainant, to account for and pay over one half the value of the rents and profits of the property; and on failure thereof, that an injunction issue to restrain the further use of the property, and that

a receiver be appointed. Ib
5. A bill for partition will not lie
while the title is denied, or depends on doubtful facts or questions of law. Dewitt v. Ackerman, 215 6. Where, upon a bill for partition, the title is denied, equity may retain the suit to give the complain-

ant an opportunity to establish his title at law. But there is no room for the exercise of the power, where the defendant has established a valid title to the premises in dis-Ibpute.

PARTNERSHIP.

1. Upon a bill between partners for an account of the partnership transan account of the partnership transactions, an allegation of the answer that a third party is a joint partner with the complainant and defendant, and, therefore a necessary party to the suit, can not be assumed to be true, at the hearing ing no common interest, to enjoin a nuisance common to all the land upon exceptions to the answer
Brewer v. Norcross, 218 219

counts of one partnership, a settlement of the accounts of another and different partnership cannot be effected upon the defendant's answer. The remody is by crossbill. bill.

3. The doctrine, that a separate debt of one partner shall not be paid out of the partnership property till all the partnership debts are paid, is applicable only where the principles of equity are brought to interfere in the distribution of the partnership property among the

the property, to the entire exclusion of the complainant, a receiver will not be appointed. A receiver will not be appointed, however, when the appointment will subject the co-tenant to inconvenience and expense, without corresponding benefit to the complainant, and such co-tenant will give the complainant security for the rents and profits.

Ib. 5. A partner, defendant to a bill for an account, will not be allowed to take possession of funds to which the firm has claims, until his right the firm has claims, until his right shall have been established by final

PART PERFORMANCE.

See Contract, 5, 6, 7. SPECIFIC PERFORMANCE, 2.

PARTY WALLS.

Sec OBDINANCE.

PEW HOLDER.

See RELIGIOUS CORPORATION.

PLEADING.

1. New matter, by way of justifica-tion or avoidance of the matters contained in the bill, will not avail the defendant upon the hearing

ing no common interest, to enjoin a nuisance common to all the land owners, but each complainant seeking relief for special injury to his own property, is demurrable for misjoinder of parties. Hinchman v. Paterson Horse Railroad Co., 76

3. As a general rule, objection on the ground of misjoinder should be 11. If an answering defendant seeks made by demurrer.

1b. a decree to establish claims outside

made by demurrer. Ib.
4. Upon a bill filed by a mortgagee for foreclosure and sale of mortgaged premises, the mortgagor may by his answer set up usury against

the claims of a mortgagee, who is made a co-defendant. He will not be driven to a cross bill, and be thereby deprived of his defence. Vanderveer v. Holcomb, 5. Where a case is made out between

detendants, by evidence arising from pleadings and proofs between plaintiffs and defendants, a court of equity is bound to make a decree between the defendants. 11 6. If the defendant asks substantial

relief, either as against the com-plainant or a co-defendant, or a discovery, a cross-bill may be necessary. But the court dispenses with the necessity of a cross-bill when the whole matter is before

it, and the party is not thereby deprived of any of his substantial rights by a decree in the existing 7. When the cause is heard upon the

bill and answer, as between the complainant and the defendant who answers, all the allegations of the answer must be taken as 1. Where a bill is defective for want true. Hoff v. Burd, 201 of proper parties, the appropriate 8. Where, at the time of the execu-

tion of a mortgage, for the fore-closure of which a bill has been filed, the mortgagor had no right, title or interest whatever in the parties, of whom the answering defendant was one, such defendant is entitled to a decree of dis-

missal.

9. The answer of one defendant is no evidence against a co-defendant. Much less can such answer avail a defendant, when not responsive to the charges of the bill, but designed to establish a case in his favor, not within the scope of the complain-

ant's case. An admission or allegation of fact in the answer will not avail the complainant, unless put in is-sue by the bill. If he desires to avail himself of such fact, he must amend his bill.

of any issue made by the pleadings, he must file a cross-bill. Ib. 12. In a bill by a purchaser of real estate, to enforce the specific performance of a contract for the sale

and conveyance thereof, an averment of tender of the purchase-money on the day designated for the execution of the contract, is not necessary. Huffman v. Hum-263 13. That an answer is insufficient in

its effect upon the points upon which it answers directly. And where the complainant has accepted it, he is bound by it. Whitney v. Robbins.

See Injunction, 10, 15, 22, 24. Practice, 1, 2, 3, 8, 24, 25, 29.

POWER OF ATTORNEY.

See Transfer of Stock, 1, 2.

remedy is a domurrer, or an objec-tion at the hearing for want of parties, and not a petition to be admitted to defend the suit. Memortgaged premises, and no power 2. The residuary legatee is not a or authority to execute the mortgage, but the title was in other claim against the estate of a testator: the executor alone is to be made defendant. He is the legal representative of the rights of the residuary legatee, and it is his duty to see them properly defended. Ib.

3. Where a bill is exhibited against an executor, involving the interests of the residuary legates, and the executor is disqualined by his situation from representing the interests and protecting the rights of the legatee, he will be admitted to No an-

defend the bill in person. swer or decree being sought against the legatee, the bill need not be amended to make him formally a so elect; otherwise, leave given to

the legatee, within thirty days thereafter, to appear and answer the bill in its present form. Ib. 5. An agreement by the complainant with the mortgagor, in a suit for foreclosure, his claim and costs having been paid in full, that the suit shall be no further prosecuted,

v. Young, 6. A defendant who has been allowed A defendant who has been allowed to proceed with the suit in the complainant's name, under Rule XIV, § 9, may enforce the payment of his demand by means of

binds the complainant only. Young

such suit, though the complainant's debt be paid in full, or he have given the mortgagor further

time.

7. Where an answer is filed, to which there is neither exception nor replication, the cause should be set down for hearing upon bill and answer; and a decree pro confesso and order of reference cannot be

taken, except by consent of the defendant. But where the cause is conducted, and the decree taken, at the instance of the defendant who has answered, his entering 14. Where the proposed amendments the decree is a waiver of his rights would change the issue, or intro-Ib.and a consent to the decree.

8. Before issue joined, where the pleadings on file have not been sworn to, amendments to the bill are permitted as the purposes of 15. The the party may require. Symour v. Long Dock Co., 169

9. After issue joined and before the discret

taking of testimony, the complain-16. In many cases, the court will in-ant will be permitted to withdraw, terfere and preserve property in his replication and amend his bill as his case may require. But after witnesses have been examined, the time for allowing amendments, except the addition of defendants, or such as do not substantially alter the case, has passed.

10. After the taking of testimony, if I there be an imperfection in the frame of the bill, if the case as

stated is insufficient to warrant the relief prayed for or to ground a complete decree, if some other point seems necessary to be made, or some additional discovery is found 4. Complainant allowed ten days to amend his bill, by making the residuary legatee a defendant, if he lil. If the bill is defective for want of parties, the complainant will be

permitted to amend by adding the perpertuited to amend by adding the given at the hearing to amend, when a matter has not been put in issue by the bill with sufficient precision; also, to amend the prayer for relief, or any clerical mistake or mis-statement.

12. After general demurrer for want of equity, amendments are granted only where there is some defect as to parties, or some omission or mistake of a fact or circumstance connected with the substance of the , but not forming the substance

itself.

13. Where, upon the final hearing, or even after appeal, it appears clearly from the evidence, that the com plainant has a case which entitles him to relief, but which, by reason of some detect or omission in the charges or allegations of the bill, is not brought fairly within the issue, he will be permitted to adapt the allegations of the bill to the case as proven. Such amendment case as proven. Such amendment however will only be allowed atter the testimony is closed.

Whose the

introduced by supplemental bill. To.

The allowance of amendments after issue joined, is a matter of indulgence to be granted in the discretion of the court.

Ib. terfere and preserve property in statu quo during the pendency of a suit in which the rights to it are to be decided, and that without ex-

duce new issues, or materially vary

the grounds of relief, they must be

the means of forming an opinion as to such rights. Huffmam v. Hummer, A judgment rendered against a plaintiff in a strict legal proceeding, is no bar to a suit in equity

pressing, and often without having

INDEX.



where the complainant presents equitable grounds of relief, which 25. The answer of the defendant to were not, and could not be, considered as substantially, and for all practical and the cross a replication to the de-

18. The complainant having failed to prosecute his suit with proper dili gence, charged with the costs of 26. In a court of equity, a decree may the motion to dissolve. Randall v. Morrell, 19. The jurisdiction of the Court of

Chancery to collect the choses in action of a judgment debtor, and apply them to the payment of his debts, has never been assumed in Robbins

20. A suit brought by a creditor, un-der these acts, must be brought for himself alone, and not for himself and such other creditors as may join therein. The relief given is for the creditor who pursues the statute; no others are entitled to share with him the benefits of the proceeding until he is satisfied. Ib 21. To a bill filed for discovery and filed for discovery and relief, under the above mentioned

title of the property charged to be held in trust had passed, and who knew, therefore, the truth of the facts to be inquired into, are proper parties. Such bill is not liable to the objection of multifariousness, on the ground that other facts may

be inquired into with which they have no concern, and that the receiver may receiver other property than that in which they were interested.

Ib.

here against a co-defendant. 20.

When a final hearing is had upon bill and answer only, by statute the answer must be taken as true, and where there is no contradic-

22. The appointment of a receiver,

under said acts, must depend upon the fact whether any chose in action or property held in trust for the debtor, has been discovered by the answers, examination, or evidence.

23. For many purposes, an original rily heard together, and the rights of all the parties, in respect to the matters litigated, are settled by one decree. Whyte v. Arthur, 521 24. This court will presume that the pleadings in the court below, were as recited in the decree. 1b. purposes, a replication to the de-fendant's answer to the original bill.

be made determining the rights of co-defendants in a controversy between themselves, in which the complainant has no interest; and semble, the party aggrieved, may appeal from such decree. Vanderveer v. Holcomb,

this state, until conferred by the 27. If, in a suit to foreclose a mortgage, acts of March 20th, 1845, (Pumph. Laws 141), and April 12th, 1864, (Pumph Laws 704). Whitney v. Robbins, 360 swer, (the subsequent mortgagee set-ting up his mortgage, and asking that the amount due it on shall be paid.) and the owner admits the existence of the mortgage, but sets up that it is void for usury, the second mortgagee will be considered, as between him and the owner, the actor, and the owner will be permitted to set up and prove the usury, without offering to pay the amount advanced.

acts, all persons through whom the 28. Where the cause is as it is here, and brought to hearing upon the evidence, the answer of the owner would not be evidence of the usury as against his co-defendant, the second mortgagee. The responsive allegations of an answer are evidence against the complainant, but never against a co-defendant. Ib.

tion, the allegations of the answer that sets up usury, must be taken as true. In such case, the remedy of the defendant, holding the mortgage alleged to be usurious, is by filing a cross-bill, or perhaps, by applying to the court for leave to and cross cause in chancery are 30. Upon a bill for foreclosure and considered as one suit, and ordinarily heard together and sale of mortgaged premises, all the subsequent encumbrancers are ne-

cessary parties, and to effectuate a complete decree, the existence, validity, order of priority, and amount due upon the several mortgages, must be settled and decided.

Vanderveer v. Holcomb, 87
31. It is no objection to permitting a

mortgagor to set up usury against the claim of a mortgagee, made co defendant, without filing a crossbill, that it deprives such mortga-gee of the benefit of his answer.

If he were complainant seeking to enforce his mortgage, he could have no benefit of an answer to 2.

the defence of usury. Ib. 32. If the lender come into equity, seeking to enforce the contract, the court will give effect to the statute and declare the contract void. But 3.

if the borrower seek relief against the contract, the court will pre-scribe the terms of its interference.

33. If a discovery is necessary to aid a defendant in a defence at law, or otherwise, equity will not require him to answer under oath, and him to answer under oath, and thus be a witness against himself in a matter which will subject him to a penalty or forfeiture, or to any loss in the nature of a for-

See Appropriation of Proceeds of SALE.

INJUNCTION, 13, 17, 19, 20, 23, 30. INTERPLEADER, 1, 2.

Partition, 2.
Partnership, 1, 2.
Pleading, 4, 6, 8, 10, 11.

PRESUMPTIONS.

 A party will not be presumed, in the absence of all evidence of the fact, voluntarily to have destroyed an instrument which he was interested in preserving. As a general rule, the legal presumption arising from proof that it cannot be found, is that it is lost. Clark v. Hornbeck,

2. Where it does not appear whether a lost note was, or was not, nego-1. Under the act of March 13th, 1866, tiable, it will not be presumed to have been negotiable; or, if negotiable that it has been endorsed tionery powers as to the mode of tiable, that it has been endorsed Ib. in blank.

See Husband and Wife, 5.

PRINCIPAL AND AGENT.

1. A party who acts as the agent of another in the sale of land, and receives the purchase money therefor as such agent, is estopped from questioning the title of his principal to the premises, or to the proceeds of sale. Von Hurter v. Neengeman. 185 Spengeman, 185
A purchase by an agent or trustee in his own name, while in the performance of his office, enures to the benefit of his principal or cestions. tui que trust. A principal is not responsible for the fraudulent act of a special agent in a matter foreign to the transaction in which he was employed. Executors of Luse

PROMISSORY NOTES.

Promissory notes exchanged between parties, constitute the one a good consideration for the other. age v. Ball, 142

PURCHASE.

1. Where two or more persons having an interest in lands, claim under an imperfect title, and one of them buys in the outstanding title, such purchase will enure to the common benefit, upon contribution made to repay the purchase money. Weller v. Rolason, 14 2. But such purchaser can claim no contribution for the price paid for the legal title, from those interested with him in the equitable estate, when the title purchased by him in no wise enures to the benefit of the catter.

RECEIVER.

fit of the estate.

tionary powers as to the mode of sale. Potts v. New Jersey Arms and Ordnance Co., 395

2. A receiver, appointed by virtue of

Vol. II.

the "act to prevent frauds by incorporated companies," will not be authorized, as the law stands, to sell the real estate, clear of encumbrances, and to pay the proceeds into the court, but must sell, as

sheriffs and other officers do, sub-

See Partition, 3, 4. PARTMERSHIP, 4. PRACTICE, 23.

ject to encumbrances.

RELIGIOUS CORPORATION. 1. Where the pews in a church have

Where the pews in a church have been purchased, and a title given to the purchaser, he has but a qualified interest. His right is subject to that of the trustees or owners of the church, who have the right to take down, rebuild, or remove the church for the purpose of more convenient worship. withof more convenient worship, with-In the absence of fraud or unfair out making any compensation to the pew-holders for the temporary interruption. Van Houten v. First Reformed Dutch Church, 126 2. A court of equity will not, on the application of a pew-owner, enjoin the pulling down and rebuilding, or removal of the church edifice by the trustees, whenever it shall be found expedient and prop-Nor will it affect the question, that the application is made by a majority of the church and congre-

See Corporations, 6, 7.

gation entitled to vote at its con

gregational meetings.

REMAINDER.

When held to be vested. Weehawken Ferry Co. v. Sisson, 475

REMAINDER MAN.

See DEVISE, 3. TENANT FOR LIFE, 1.

REMEDY.

Equity will not interfere where adequate relief can be had at law.

Hoagland v. Township of Dela-106 ware.

> See PRACTICE, 1. STATUTES.

RESIDUARY LEGATEE.

See PRACTICE, 2, 3.

RIPARIAN PROPRIETORS.

The Passaic, at the Great Falls, is a private river. The society are the riparian proprietors, and are entitled to the use and enjoyment of the stream, without diminution or alteration. The Society v. Low, 20

SALE.

practice, erroneous information of the day fixed for a sale of mortthe day fixed for a sale of mort-gaged premises will not operate to set aside the sale, on the ground of surprise, where the mistake was corrected, and the party informed of the hour of sale in ample time to have been present, if he had so elected. Hazard v. Hodges, 123

See EXECUTION.

SCIRE FACIAS. 1. Where to a scire facias upon a decree

payment is set up as a defence, the burden of proof is upon the de-fendant. Executors of Smith v. Burnet, 40 Absence from the state held no ground for postponement of a de-cision, or for the exercise of discretion in permitting further delay.

SET-OFF.

1. The general rule in equity, as well as at law, is that joint and separate debts, or debts accruing in different rights, cannot be set off against each other. But, wherever it is necessary to effect a clear equity, or to prevent irremediable injus-

tice, the set-off will be allowed, though the debts are not mutual.

Brewer v. Norcross, 219
2. In cases of insolvency, or of joint credit given on account of individual indubtedness or when the

In cases of the credit given on account of individual indebtedness, or where the joint debt is a mere security for the separate debt of the principal, the equity is obvious, and the set off will be allowed.

Ib.

SURETY.

SURETY.

the principal, is at once subrogated to all the rights, remedies and securities of the creditor.

Rigek

189

SPECIFIC PERFORMANCE.

1. Equity will not decree the specific reasonably doubtful whether the contract was finally concluded. The parties will be left to their remedy at law. Brewer v. Wilson 180 performance of a contract, if it be

edy at law. Brewer v. Wilson, 180
2. Specific performance will not be decreed on the ground of part performance of the contract, unless the part performance has been such as clearly to take the case out of the operation of the statute of

frauds. irauds.

3. As a general rule, in equity, time is not deemed to be of the essence of the contract, unless the parties have expressly so treated it, or it necessarily follows, from the nature and circumstances of the contract. Equity holds time to be prima facie non-essential, and will enforce the specific performance of

enforce the specific performance of agreements, after the time for their performance has been suffered to

pass by the party asking for the intervention of the court. Ib. Sec CONTRACT, 10. Pleading, 12. VENDOR AND PURCHASER,

STATUTES.

A remedial statute, superseding a remedy in force at the time of 1. The tenant for life and remaindermaking a contract, and giving the party satisfaction in a shorter time more direct mode, does not deprive him of a previously exist-ing remedy. Potts v. New Jersey Arms and Ordnance Co., 395 Arms and Ordnance Co.,

STATUTE OF FRAUDS.

See EVIDENCE, 21. SPECIFIC PERFORMANCE, 2. SUPPLEMENTAL BILL.

See PRACTICE, 10, 14.

2. Where the debt has become payable, the surety may file a bill to compel payment by the principal, in order that he may be relieved from responsibility. Ib.

3. Where the creditor is fully indemof loss, he will be compelled to resort to the property of the principal in satisfaction of his claim, before

satisfaction of his claim, before coming upon the surety. Ib.

4. Upon a bill by the surety to compel the payment of the debt by the principal, neither notice to the creditor of the suretiship, nor an allegation of irreparable injury if the surety be compelled to pay the debt, constitute an essential element of the surety's right to equit. ment of the surety's right to equitable relief.

SURPRISE.

See Injunction, 5. SALE.

TAX.

See Devise, 4. Injunction, 12.

TENANT FOR LIFE.

man, each pay insurance for their respective interests. Executor of Executor of Kearney v. Kearney. 59

2. A right given by will to occupy, at a specified rent certain premises as long as the devisee may de-

Thomas v. Thomas, 356
3. Such tenant is bound to keep down the interest of the encumbrances on the property, but he cannot be

sire to occupy the same as a drug store, amounts to an estate for life.

compelled, as between himself and the remainder-man, to pay off any part of the principal.

> See DEVISE, 3. Will, 3.

TRANSFER OF STOCK.

1. A certificate of stock in an incor porated company, accompanied by a power of attorney, authorizing the transfer of the stock to any person, is prima facic evidence of equitable ownership in the holder, equitable ownership in the holder, and renders the stock transferable by the delivery of the certificate. And when the party in whose hands the certificate is found, is shown to be a holder for value, and without notice of any intervening equity, his title as such owner cannot be impeached. Mount Holly Turnnike Co. v. Ferree. 117

Holly Turnpike Co. v. Ferree, 117
2. The purchaser of a certificate of shares of stock, with an irrevocable power of attorney from the owner, without notice of any intervening equity, has a perfect 9. A executed to B an assignment of
right to fill up the power to himself, and to recover at law against
ing to about \$1300, in trust to colthe company for refusing to assign the stock upon his demand.

TRUST AND TRUSTEE.

- 1. If a trustee dies without executing the trust vested in him, the trust urvives, and equity will decree its Weller v. Rolason due execution.
- 2. Where a testator, by his will, has directed his executor to purchase real estate, and hold it subject to certain trusts in said will named, but the deed therefor contains no declaration of the trust, the executor will, nevertheless, be declared to have been seized of the land as trustee for the purposes specified in the will.
- One of several cestuis que trust can-not, by purchasing the legal title to the land which forms the subject of the trust, defeat the equitable title of the other cestuis que trust thereto, when such purchase was made with a knowledge of their

equity. The estate in his names will be held subject to the purpose Ib. of the trust. 4. If the trustee deem that the inter-

est of his cestui que trust, the remainderman, require repairs to the estate before he comes of age, he

will be authorized to repair. Ex-ecutor of Kearney v. Kearney, 59 5. Where interest is given against a trustee, as a remedy for a breach of trust, costs follow as of course. Frey v. Administrators of Frey, 72

6. No assignment in writing is neces-No assignment in writing is neces-sary to transfer the title to securi-ties delivered under the provisions of a trustdeed. A valid title passes by delivery. Vreeland v. Van Horn,

ble question or doubt, that a trustee is entitled to come into court to have that question determined. Executor of Vanness v. Jacobs,

lect the moneys due thereon, and after satisfying certain claims against A, to pay out of said money against A, to pay out of said money to C a debt of \$1231, with interest, and to pay the surplus, if any, to the complainant. A afterwards filed a bill to set aside the assign A afterwards ment in favor of C, on the ground that there was no debt due to him that the notes which constituted the pretended indebtedness were given without consideration, and with a view to the creation of the trust; and that the real considera-tion of the assignment in favor of C was an agreement by him to maintain the complainant during life. The evidence corroborated

reused to execute the agreement on his part. He resists the bill, and attempts to enforce the execution of the trust. Held—

First. The trust in favor of C is inoperative and void.

the allegations of the bill. C re-

refused to execute the agreement

Second. So much of the trust money as has been paid to C must be refunded.

Third. The balance of the fund in the hands of the trustee, after a proper allowance for his services, must be paid to A and the notes surrendered to him. Lanning v. Administrator of Lunning, 228
10. Under a declaration of trust: "1.
To pay to A. M., or to her order, such dividends as may be declared by said bank during her natural life. 2. At her decease, to pay the same to S. V., or to her order. 3.
After the decease of said S. V., then to transfer the said stock to A. M. V., for her sole use and benefit," held, that the interest of A. M. V. vested. Administrator of Lanning,

incapacity to become a purchaser at the sale of the real estate of his

cestui que trust, by the fact that the legal estate therein is not in him, 13. Where the subject matter of the

trust is in controversy, all the trustrust is in controvers, and tees must be made parties. Sayre

v. Styre, 349
14. The mere fact that the title to trust property is deposited in trustees, will not deprive the grantor of his control over it, if his rights and limited or in some way are not limited, or in some way qualified, by the deed.

A trustee will not be permitted to derive any profit from the use of the trust funds in his hands. Staats

Bergen, 16. It is the universal rule, that a trustee must not put himself in a position in which he will be tempted, from the influence of self-interest, to take advantage of his cestui

que trust.

15.

17. A purchase of land at a sheriff's sale, by a trustee, on a bill on a mortgage held by him in trust, his bid not being sufficient to pay off

such mortgage, and the land sold being subject to two other mortgages in which the cestui que trust had an interest, will be declared, in equity, to enure to the benefit of the cestui que trust. Ib.

See Cestul que Trust. Corporations, 8. DEED, 12. WILL, 4, 9.

USURY

for her sole use and benefit," held, that the interest of A. M. V. vested at the creation of the trust. Excenters of Whitchead v. Stryker, 275.

11. It is the recognized law of this state, that a trustee, in the exercise of his duty as trustee, cannot become the purchaser of the property of his cestui que trust. The rule applies, as well where the sale is 2. The rule applies, as well where the sale is 2. While it is the duty of the court to maintain the law against usury, and carefully to prevent its evasion, it will not enforce its severe penalties, without evidence entirely satisfactory and free from doubt. Barror decree. Stants v. Bergen, 297.

12. A trustee is not relieved from his 3. Where usury is set up as a defence incapacity to become a purchaser.

to the foreclosure of a mortgage, it must be satisfactorily proved by a clear preponderance of evidence in its favor. If the defendant swears to it himself, and the plaintiff denies it by his evidence, in the absence of other proof, there is no preponderance of evidence in defendant's favor, and the usury is not proved. Dissenting opinion of Van Dyke, J.

Where, however, the defence was,

reason of the complainant's having exacted from the defendant notes, exacted from the defendant notes, amounting to \$5100, as a bonus for a loan of \$20,000, and that the only consideration for the notes was the consideration for the notes was the loan; and the complainant, in his evidence, admits the giving and receiving of the notes, and that he neither paid, nor did the defendant receive, anything for the notes, but contends that the notes were given on account of another transaction, and not on account of the most. and not on account of the mort-gage in question, the burthen of proof, that the notes were given and received in another transaction,

that the mortgage was usurious, by

is shifted to the complainant. he admits facts which, prima facie, establish the usury but seeks to avoid that conclusion by alleging new matter, he must establish such new matter by a clear preponderance of proof in its favor. Dissenting opinion of VAN DYKE, J. Ib The sheriff having advertised the new matter, he must estate in a clear preponder-ance of proof in its favor. Dissent-ing opinion of VAN DYKE, J. Ib 5. The sheriff having advertised the complainant's property for sale, under executions, the complainant procured the detendant to advance their amount to the plaintiffs in execution, upon an agreement that the judgments should be assigned to him, and a mortgage for the amount, given to him by the com-plainant, and that he, the defend ant, would then stay the executions the mortgage upon foreclosure aving been declared void for having been declared void for usury, the sheriff re-advertised. Held, that, as regards the assignment of horrower and ments, the relation of borrower and lender did not exist, that the transaction amounted in legal effect to action amounted in legal business apprehase of the judgments, and that the binding effect of the judgments was not affected by the mort-Giveans v. Mc Murtry, 510 gage.

See Pleading, 4. Practice, 27, 28, 29, 31, 32.

VENDOR AND PURCHASER.

Equity regards a contract for land, of which a specific execution will be decreed, for most purposes, as if it had been specifically executed. The purchaser is regarded as the equitable owner of the land, and the vendor of the money. Huffman v. Hummer,

See Contract, 1, 2.

WILL.

1. A testator, by his will gave and bequeathed as follows: "I give and bequeath to Susan K. the sum and bequeath to Susan A. the sum of \$10,000, to be paid to her on her reaching the age of sixteen years." Held, that the legatee takes a vested interest in the legacy, liable to be defeated by her death helds reaching the age of sixteen before reaching the age of sixteen 5. A testator, by his will, devised as

interest on the legacy from the death of the testator. Eccutor of Kearney v. Kearney, quarterly in advance by my executor, commencing with her attaining her fifteenth year." *Held*, that Virginia is not entitled to maintenance out of the testator's estate; she has no interest in the estate beyoud the annuity itself, which cannot be anticipated. 1b. The codicil also contained the fol-lowing clause: "It is my will that my wife shall have the right to ocmy wife shall have the right to oc-cupy and possess my estate called Bellegrove, in New Jersey, as well as all my furniture, household goods, silver, books, paintings, stat-uary, and other works in the fine arts, there or elsewhere, to hold to her during her natural life and widowhood." Held, that this is an estate of freehold with all its rights and incidents: the gift is of the and incidents; the gift is of the right to possess the property, real and personal, during the life of the widow, if she remain unmarried; and if she marry, during widow-hood only. It necessarily involves the right to use the personal property upon the estate or elsewhere, at her pleasure. The widow is at her pleasure. bound to repair only to the extent of preventing waste. Ib. A direction to an executor, "as soon as convenient after the testator's death, to have the residuary estate allotted and set off in separate portions, and to hold the same

years; and that she is entitled to

severally in trust until the coming of age of each of the sons, and as each son comes of age, to execute and deliver to him a sufficient fee-simple deed therefor," does not vest in the executor an estate in fee to be held by him in trust for the purposes specified in the will, where the manifest design of the testator was that the residuary estate should vest in his surviving son in posses-sion and enjoyment, upon his attaining the age of twenty-one years.

my real estate to my children, share and share alike, but the shares which may fall to my sons, George and Michael, I do give to them only during their natural lives, and after their death, to go to their 9. children, share and share alike, and it any of their children shall die

before their father, leaving children, then the children to take their father's or mother's part. George died leaving no issue. Helddied leaving no issue. Held-1. George and Michael, the de-

visces for life as well as the other children of the testator, take several, not joint interests in the residuary

2. The estate of each tenant continues during his life, and upon his

death, goes to his children. If he have no children, the devise over fails, and as to that reversionary interest, the testator died intestate 3. The remainder of the share de-

vised to George, vests not in the surviving children of the testator, but in his heirs-at-law. Vrccland v. Van Ruper, 6. Where, by the residuary clause of

his will, after numerous specific devises of portions of his real estate, lower a testator directs all the residue of his estate, both real and personal, to be divided into equal shares or parts, which he gives and bequeaths to his children and grand-queaths to his children and grand-that the testator designed that the entire residue, real as well as personal residue, real residue, real residue, real as well as personal residue, real as well as personal residue, real ceeds distributed among the resid-

Executors of Vannass v. Jacobus, 153
7. A direction by the will, to divide the residue of the testator's lands will not be construed technically as a devise, where the testator has expressly directed the executors to

uary legatees.

sell the lands not devised. 8. A testator gave the residue of his estate, real and personal, in trust to receive the rents and income, and to pay over the net interest and income in three and one eighth parts, to wit: one-third part to my daughter C. H., one-third part to my daughter S. B., and one-third and one-eighth parts to my daughter M. D."

follows: "I do give the residue of Held-That M. D. takes one-eighth of the estate, and not one-eighth of a share, more than the other legatees; the remainded to be equally divided between the three. Tuttle v. Howell, A testator, by his will, ordered and directed as follows, viz: "I do hereby appoint and declare my ex-ecutors, hereinafter named, to be trustees of all property, estate, or interests, herein given or devised to any of my children, or that any

of my children may be entitled to by virtue of any provision in this my last will, during the life of such child (excepting the life estate in the mansion-house devised to my

son) with full power to retain all such property in their hands unsold and undivided, until after the year eighteen hundred and sixty seven,

and I do authorize my said execu-tors to sell or convey all or any part of my real estate, and all real estate that may be purchased by them, &c. Held, that the power of

sale extends to any and every part of the testator's e-tate, and not to the trust estate only. Bacot v. Wetmore,

10. An express disposition, though probably involving an oversight or mistake by the testator, cannot be controlled by inference which is not necessary and indubitable. 1b.

in law the sole and exclusive use of all the rents and profits of a certain farm, known as the "Biddle farm," to be held by her from the time of his decease until the 25th March, immediately preceding the time when his grandson, J. S. should arrive at twenty-one, with a proviso that the daughter in law should release to his executors all claims she might have against his estate. From the 25th day of March, before designated, the Biddle farm was devised to testator's two grandsons. By a residuary clause, the testator gave all the residue and remainder of his estate (undisposed of) to his four daughters, subject (in the language of the will) "only to the payment of

all just claims against me on note or book account, funeral charges, testamentary and incidental expenses, and commissions." The estate was indebted to the daugh ter in law by bond, in the sum of \$5000, which she refused to release, and consequently did not take the term in the Liddle farm

First. That the term in the Biddle farm was not specially appropriated to the payment of the debt due to the daughter in law.

terms of the residuary clause, was made subject to the simple contract debts. Shreve v. Shreve,

12. As a general rule, a direction by a testator that all his debts shall debts on the realty. But where the direction is that the executors shall pay such debts, such effect will not be produced.

1b.

13. A debt due by specialty is, pro-prio vigore, a burden, equally, upon specific legacies and lands vised. 14. The testator directed his trustees to pay over the income of his es

tate in three and one-eighth parts, to wit: one-third part to his daughter, S. B., and one-third and 18. The husband alone obtained let-one-eighth parts to his daughter, M. D. Held, that M. D. was entitled to one-eighth more of the whole estate than either of her sistems, making ten twenty-fourths for:

1. The husband alone obtained letters testamentary. Judgments were recovered against him by his creditors, and his interest in the farm was sold by the sheriff to Van Sweldel, the court courts. tate in three and one-eighth parts,

ters, making ten twenty-fourths for M. D., and seven twenty-fourths for C. H. and S. B., each. Howell Tuttle, v. Tuttle, 540 540 of the death of either daughter, without children, that his trustees

should pay the income arising from his estate, in the proportions aforesaid, to his surviving daugh ters, stating his intention that the share of such daughter should sink into, and constitute a part of his estate in the hands of his trustees, and the income arising therefrom,

husband, was in possession, as trustee, for the sole and separate use of the wife.

be divided among his surviving daughters in manner aforesaid. Held, that if C. H. should die without children, her share would be a part of the whole income, and M. D. entitled to one-eighth more of the whole than S. B. and not to one-eighth more of the whole, and one-eighth more bewhole,

sides, than S. B., of the share of C. H. Ib. C. H. Ib.

16 The same rules apply to the disposition of the principal sum un-

der this will. to the daughter in law.

Second. That this term passed under the residuary clause of the will.

Third. That, in the payment of debts, it was to be considered as a part of the personal estate, and, by the terms of the residuary clause was a part of the residuary clause was and also if she should be discovered. and also, if she should be dispos-sessed of the farm in any way or

manner whatever, that his execu-tors should take charge of her estate, and rent out the land to the best advantage, and pay over to her the rents and interest money yearly, and her receipt, and hers only, should be sufficient for the same. *Held*, that there was a legal estate in the wife, limited upon the contingency of disposses-sion, subject to the marital rights sion, subject to

of the husband till then, but when

that occurred, a trust estate began in the executors for the rest of the life of the wife, to her sole

were recovered against him by his creditors, and his interest in the farm was sold by the sheriff to Van Syckel; the court enjoined Van Syckel from proceeding in ejectment to recover possession, upon the ground that the dispossession, in equity, occurred at the delivery of the deed to Van Syckel, and that from that time N. E., the husband was in possession, as

WITNESS. See EVIDENCE, 6, 9, 14, 15,





.

•





